PLEAS
OF THE
CROWN:
OR,
A Methodical Summary of the Principal Matters relating to that Subject.

By Sir MATTHEW HALE *Knight, late Chief Justice of the Kings Bench.*

LONDON,

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THE PREFACE.

THE PREFACE.

THere was lately publiſhed an Impreſſion, ſuch as it was, of this Book without any name of Author to it, but yet was commonly given out to have him written by the late chief Juſtice Sir Matthew Hale, and ſold for a Book of his writing. The Original indeed was written by him many years ſince; but that Impreſſion, as it ſeems, was from a ſurreptitious and very faulty Copy, and was accordingly very faulty and corrupt throughout in many reſpects, what by Omiſſions not only of Marginal References very frequently, but of many intire Paragraphs, whereby the Book it ſelf is in many places mutilated, as the Reader may eaſily obſerve pag. 19. 23. 48. 52. 57. 108. 110. 122. 183. 187. 199. 202. 203. 208. of that Impreſſion compared with

this, besides divers other shorter, but not less material Notes left out in other places: what by Omissions and Mistakes of single words, sentences, and parts of sentences, and sometimes by an unskilful critical endeavour to restore to some sense what those mistakes had made non-sence, whereby the sense is in many places maimed and broken, in some much altered, and in some expressed quite contrary to the Authors words and meaning. Instances whereof the Reader may see pag. 1. lin. ult. p. 4. l. 1. p. 7. l. 6. p. 10. l. 17. p. 14. l. 6. p. 15. l. penult. p. 16. l. 13. &c. the like throughout the whole Book. And what by Transposition of divers matters misplaced among other things to which they have little or no affinity or relation, whereby they are not only wanting in their proper places, but the order and coherence of those other matters among which they are interposed, is interrupted and confounded. Thus one half of the matter belonging to the Title Proces, which should have bin continued pag. 176. is placed pag. 191. 192. 193. under the Tit. Fleta, and

and the greatest part of the title Principal and Accessary *which should have bin continued pag.* 196. *is there left off in the midst of a sentence and placed before at page* 177. *as if it were the beginning of the title and under the same title, Paragraphs together, which belong to* Accessaries after, *and should here be continued pag.* 180. *where in the Original they have a connexion with what immediately precedes and follows, are placed before at pag.* 179. *among what belongs to* Accessaries before. *Again the greatest part of what belongs to the Title* Clergy, *and should have bin continued pag.* 191. *is placed pag.* 197. *&c. under the tit.* Arraignment. *But these might be added other faults and mistakes, but these may suffice to shew the general corruption of that Impression.*

And though divers of these faults and mistakes are not to be imputed to any Negligence in the Transcriber or Publisher, (whereof notwithstanding he cannot be acquitted in others) but partly to his unacquaintance with the Authors hand; *and partly to his*

Ignorance of his way of writing, who frequently at the end of his Chapters or Sections used to leave more or less blank paper, and when other matter occurred, more than could be inserted in those places, did many times write the rest in some other place, where he found most room for it, and for the most part without any note of reference to it; so that it was very difficult for any, who was not well acquainted with his writings, to reduce those transpositions to their proper places; and therefore of the many Copies, which are abroad of this Book, I could never yet see any free from divers such mistakes: yet by this means (to mention no other) whether through want of Skill, or of Care, or of acquaintance with the Authors hand and way of writing, both the Author himself was much injured by the Publication in that manner, and the Reader also.

Wherefore to do some Right to the Memory of the deceased Author, and to the Publick, and more particularly in some sort (as far as in respect of some circumstances was thought fit) to gratifie the

the Gentlemen of this honourable Profession of the Law, who possibly may take it ill to be totally deprived of the benefit of the writings of so great a Master in it, it was thought good by a friend of the Authors, (whose care the Author desired in the Publication of his writings, after his death) to furnish the Book-sellers *with a compleat Copy corrected according to the Authors Original, only what things were therein transposed were in the Copy reduced to their proper places according to his mind.*

To this end it is fit also that the Reader be acquainted that this Book was written many years since, *about the end of the Reign of King* Charles *the First, or not many years after; was not by the Author* intended for the Press, *nor fitted for it; and as he saith in a Letter to one of his honorable Brethren, to whom he lent it, was then* never read over *by him* since he wrote it, *as the Reader may of himself perceive by some faults, which had escaped him in writing, and remain uncorrected, as pag.* 8. *lin.* 22.

after the word Dower it is apparent that the word [saved] or some such is wanting (which in the former Impression was indeavoured to be amended, but not without diminution of the Authors meaning) and some others, which are left to the Reader to correct according to his own judgment, a method often approved by the most judicious Criticks in the publishing of other mens writings, and for some special reasons at this time thought fit to be observed in this.

But lest while we indeavour to do Right to the Author, we should do wrong to his Book, the Reader must also know, that notwithstanding what hath been said, this Book hath bin well accepted and esteemed by divers of the most eminent Lawyers, who much desired and obtained of the Author himself to have Copies of it many years since. And though probably the Author never at all read it entirely over after he wrote it, yet it is certain he many years after made divers occasional additions to it: and, if I be not much mistaken, he did usually carry it with him in his Circuits.

He

He hath written a large Work upon this Subject, intituled, An History of the Pleas of the Crown, wherein he shews what the Law currently was in these matters, what Alterations have from time to time been made in it, and what it is at this day. He wrote it on purpose to be printed, finished it had it all transcribed for the Press in his life-time, and had revised part of it after it was transcribed: but whether, or when it will be published is uncertain. In This he doth *summarily relate what the Law is at this time, or rather was when he wrote it, for some Alterations it hath since received, though not many, by some late Statutes; and therefore may not only be of use till that be published, but may also continue of good use after that is published, when ever it be, as the most proper* Introduction *for Students to this part of the Law that is extant, and as a Synopsis or Epitome of the most useful part of that.*

A Table

A Table of the Titles and Method of the Book.

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Of

Of the Faults *which have* escaped *in this Impression, some few are only in respect of breakes, and such like, which do not hurt the sence; and the rest are to be corrected as followeth:*

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In the Margin.

Pag. 9. d. Trotman Ab. p. 382. 50. 52. Crom. r. Com. 94. r. M. Car. r. C. M. Car. 99. 3 H. 7. c. 3.

Notes used by the Author in his References.

C. M. Car. *Coke upon Mag. Carta.*
C. West. 1. *Coke upon W. 1.*
C. PC. *Coke's Pleas of the Crown.*
Com. *Plowden's Commentaries.*
Cr. & Crom. *Crompton.*
Dal. *Dalton's Justice.*
Dy. *Dyer's Reports.*
Kel. *Kelwaye's Reports.*
Lamb. *Lambert's Justice.*
S. PC. *Stamford's Pleas of the Crown.*
4. R. *Coke's 4. Reports.*
9. R. *Coke's 9. Reports.*

I License this Book to be printed by *William Shrewsbury*, 18th Mart. 1677. *Ri. Raynsford.*

PLEAS
OF THE
CROWN.

THis Treatise (is) divided under these Considerations,

1. Of the *Kinds* of Offences.

2. Of the *Incidents* unto these Offences.

The *Kinds* of the Offences are distinguished according to the diversity of the Laws by which they are introduced, *viz.*

Offences by the Common Law.
Offences by the Statute.

Offences *by the Common Law* distinguish'd according to the degrees of the Offence,

{ Capital,
{ Not Capital.

Of *Capital* Offences, they are such

1. As are immediately against God.

2. Immediately against Man.

Those that are Offences *not Capital* by Common Law, as Misprisions, Maihim, Breach of the Peace, &c.

Offences *by the Stat.* { Capital.
{ Not Capital.

The latter are many, and not here to be treated of.

Hereof.

Hereſie.

1. NOw firſt concerning Offences *Capital*, that are *immediately againſt the Divine Majeſty*, which are

§ Hereſie,
§ and
§ Witchcraft.

1. Concerning *Hereſie*, wherein conſiderable,

I. *What* is Hereſie?

At this day all thoſe former Acts which determined certain Points to be Hereſie ſtand repealed; and though there be no expreſs Act determining what ſhall be ſaid Hereſie, yet the Statute of 1 *El. c.* 1. directing the High Commiſſion, reſtrains it. C. Pl. c. 5. 8 & 1 El. c. 1.

1. To what formerly determined Hereſie, by the Authority of the Canonical Scriptures.

2. To what adjudged ſo by the firſt four General Councels.

3. To what expreſly adjudged

Hereſie by any other General Councel by expreſs words of Canonical Scripture.

4. To what ſo determined by Parliament by aſſent of the Convocation.

II. Who to *judge of* Hereſie?

1. The Temporal Judge cannot puniſh any Perſon for Hereſie by Indictment or otherwiſe:

But yet incidently he may take knowledge whether a Tenent be Hereſie, or not: As where by force of the Statute of 2 *Hen.* 4. now repealed, *Keſar* was committed for ſaying, *That though he were Excommunicate by the Archbiſhop, he was not ſo before God*; and *Warner* committed for ſaying, *Non Tenetur ſolvere decimas*, and thereupon impriſoned: In a *Habeas Corpus* by the former, and a ſpecial Juſtification in an Action brought by the latter, adjudged neither Hereſie.

M. 5 E. 4. Rot. 143. coram Rege.

M. 11 H. 7. R. 327. C. B.

2. All the Statutes that gave power to Arreſt or Impriſon for Hereſie, *viz.* 2 *Hen.* 4. 15. 2 *H.* 5. 7. 5 *R.* 2. *c.* 5. 1 & 2 *Ph. & Mar. c.* 6. are repealed by 1 *Eliz.* III. The

III. The way to *Convict* of Hereſie.

1. By the Common Law.
   1. By the Archbiſhops and Biſhops in a General Synod.
   2. By the Biſhop of the Dioceſs.
2. By the Stat. 23 *H.* 8. *c.* 9.

By the Archbiſhop in caſe of the aſſent or neglect of his Suffragan.

IV. The *Puniſhment* of a party convict of Hereſie.

Upon Certificate of ſuch Conviction, a Writ *De Hæretico Comburendo* granted, without which they cannot proceed to any temporal puniſhment.

But if after Conviction he abjure his Opinion, his life (is) ſaved.

But if he relapſe after Abjuration, then irrecoverable.

5. But (by) the Statute 2 *H.* 5. *c.* 7. all Statutes which introduc'd any Forfeiture ſtand repealed: Neither did the Common Law inflict any Forfeiture, becauſe the proceeding was only *pro ſalute animæ.*

Witchcraft.

AT Common Law Witchcraft punished with death, as Herefie, by Writ *De Hæretico Comburendo.*

C. P. c. 6.

The Statute of 1 *Jac.* 12. the only Law now in force against it, and divides it into *two Degrees:*

1. Witchcraft in the *first Degree* made Felony without benefit of Clergy, including *four Species:*

1. *Invocation* or Conjuration of an Evil Spirit.

2. *Conſults, covenant* with, *entertain, employ,* feed, or reward any Evil Spirit to any intent, (though no act be done thereupon.)

3. *Take up* any *dead Perſon,* or any part thereof, to be employed or uſed in Witchcraft, Charm, &c. (though not actually uſed or employed.)

4. Exer-

4. Exerciſe any Witchcraft, Inchantment, Charm, or Sorcery, whereby *any Perſon* ſhall be *killed*, deſtroyed, conſumed, *or lamed* in his or her Body, or any part thereof (which requires the act to be done, *viz.* laming, conſuming, &c.)

Theſe and all Acceſſary before to ſuffer as Felons without Clergy: But Acceſſaries may be after; but then they have Clergy, becauſe not ſpecially excluded.

II. Witchcraft in the *ſecond Degree.*

1. (To) *take upon them* by Witchcraft, Inchantment, Charm, or Sorcery *to tell where* Treaſure is to be found: They that take upon them to do it, though they cannot, yet within this Law.

2. Or where Goods (loſt) or ſtollen may be found.

3. Or to the intent to *provoke* any Perſon *to unlawful Love*; theſe Clauſes come under the word [*taking upon.*]

4. Whereby *Goods or Cattel* shall be *destroyed* (which requires an actual destroying, and not a bare taking upon them).

5. Or shall use Witchcraft, &c. *to hurt any Person*, though the same be not effected.

The *Punishment* of these,

1. The first Offence a years Imprisonment and Pillory.

2. The second Offence Felony: but this requires;

1. An actual conviction and Judgment for the first.

2. The second Offence must be committed after the Judgment for the first.

The like in Forgery, Transportation of Sheep, &c.

But the Consequents upon an Attainder, *viz.* Corruption of Blood, and loss of Dower: but during life the Lands forfeit.

And Note, a Saving against Corruption of Blood preserves the Descent; and a saving of the Land to the Heir prevents corruption of Blood.

High

High Treaſon.

CConcerning Offences *againſt man* immediately diſtinguiſhed in their Judgment or Event: Capital, or not Capital.

Capital, either by the Common Law or the Statutes; and theſe either Treaſon or Felonies.

Treaſon, either { High Treaſon, or Petit Treaſon.

High Treaſon: and this though an Offence at Common Law, yet becauſe there be ſome mixtures of Introductions of new Treaſons by Statute, would be conſidered together.

1. Conſidering High Treaſon, it is diſtinguiſhed into *four kinds*.

1. That which concerns immediately the King, or his Wife, or Children.

2. That

2. That which concerns his Officers in the Administration of Justice.
3. That which concerns his Seal.
4. That which concerns his Coin.

Before we come to the Particulars, some things to be generally *premised*.

1. That those that have any such disability upon them, that disables them to act reasonably, cannot commit Treason, *viz. Non compos mentis*, and Infants within the Age of discretion.

And therefore if a Traytor becomes *Non compos* before Conviction, he shall not be Arreigned; if after Conviction, he shall not be executed. C. P. fo. 4.

An Alien Enemy, committing any hostile act, dealt with as an Enemy: an Alien any committing any Treason a Traytor within the Law.

2. The Statute of 25 *E.* 3. reduced and settled all Treasons; and by that means all Treasons that were before

before are reduced, and the Stat. of 1 *Ma. c.* 1. reinforced the Statute 25 *E.* 3. and reduced all new Treasons unto the old Standard of 25 *E.* 3. and so all new Treasons declared between 25 *E.* 3. and 1 *Ma.* abrogated.

3. All Treason includes Felony; therefore if the Indictment want *prediverie*, a Pardon of all Felonies discharges it. 3 C. Pl. 15.

Now concerning *the kinds* of High Treason.

1. *Compassing* and imagining *the death* of the King, Queen, or Prince, and declaring the same by some open Deed.

I. What (is) a *Compassing* the death?

Declaring by an open act a design to Depose or Imprison the King, is an Overt act to manifest a compassing of His Death.

Calculating Nativity *de Roy ne-my* compassing.

II. What a *King*?

1. A King before his Coronation,

a King within this Statute when the Crown deſcends upon him.

2. A King *de facto*, and not *de jure*, a King within this Act, and a Treaſon againſt him puniſhable, though the right Heir get the Crown.

3. A Titular King, that is not Regnant; as the Husband of the Queen regnant not a King within the Act. V. 1 & 2 *Ph. & Ma.* c. 10. but the Queen is.

4. The right Heir to the Crown, yet not in Poſſeſſion thereof is not a King within the Act.

III. What the *King's Wife?*

It extends not to a Queen Dowager.

IV. What the *eldeſt Son and Heir* of the King within the Act?

The ſecond Son, after the death of the eldeſt, within the Stat.

The eldeſt Son of a Queen Regnant within the Statute.

The Collateral Heir apparent, as *Roger Mortimer* 11 *R.* 2. the Duke of *York* 39 *H.* 6. not Son and Heir, within this Act.

V. What

V. What an *Overt act* requiſite to make ſuch compaſſing Treaſon?

1. An Overt act muſt be alledged in every ſuch Indictment, and proved.

2. Compaſſing by bare words is not an Overt act, as appears by many temporary Statutes againſt it: 26 *H.* 8. *c.* 13. 1 *El. c.* 6. 13 *El. c.* 1. 14 *El. c.* 1. *&c.* but the ſame ſet down by him in writing is an Overt act.

3. Conſpiring the death of the King, and providing weapons to effect it, or ſending Letters to ſecond it; aſſembling People to take the King into their power; Lord *Cobham's* caſe; writing Letters to a Foreign Prince inciting to invaſion; an Overt act.

4. Conſpiring to levy War no Overt act unleſs levied, becauſe it relates to a diſtinct Treaſon.

II. Treaſon *levying War* againſt the King.

1. A conſpiring or compaſſing to levy War, without a War *de facto*, no Treaſon; but if a War levied, the Conſpirators Traytors as well

as the Actors: This appears by the Stat. 13 *El.* c. 1. that made such Conspiracy to levy War Treason during the Queens life.

2. A raising a Force to burn or throw down a particular Inclosure only a Riot; but if it had been to go from Town to Town, and cast in all Inclosures, *Bradshaw*'s case; or to change Religion, or to inhance the Salaries of Labourers, a levying of War, because the End publique.

3. Joyning with Rebels *pro timore mortis, & recesserunt quam cito potuerunt*, no levying War. *Oldcastle*'s case.

4. Holding a Fort or Castle against the King's Force a levying War.

III. Treason *Adhering to the King's Enemies*, giving them Aid within the Land and without.

1: What *Adhering*?

1. Giving Aid and Comfort to them.

2. Surrender the King's Castle for reward.

2. What

2. What an *Enemy?*

1. The Subject of the King becoming a Rebel, he that out of the Realm succours him, this not adhering to an Enemy within this Clause.

2. An Enemy coming hostilely into *England*, shall be dealt with as an Enemy, executed by Martial Law, or ransomed; but a Subject assisting him shall be dealt with as a Traytor.

3. The *Scots* invading *England* in the Queens time, adjudged Enemies, though *Scotland* then in Amity. *Lord Herr's* case.

3. *Within the Land* or without, how that Foreign Treason shall be tried.

1. At Common Law for a Foreign Treason, the Indictments and Trial must be where the Land lies.

2. By the *Stat.* 35 *H.* 8. which is yet in Force it may be inquired of and tried in *B. R.* or by Commission in any County where

Dy. 298.

where the King appoints; the King's Signature may be either to the Commission or the Warrant thereof.

Treason done in *Ireland* is within that Statute, *Perrot's* Case.

Trot. Ab. p. 382.

3. By the *sta.* 28 *H.* 8. *c.* 15. Treason upon the Sea inquirable and triable by Commission in any County; at Civil Law it must be before Lord Admiral.

IV. Treason, *Violation* of

1. The King's Wife extends not to a Dowager.

§. If she consent 'tis Treason in her.

2. The Prince's Wife.

§. The same Law as before.

3. The King's eldest Daughter then living.

Thus far of Treasons that relate to the King's Person and nearest Relations, wherein generally

1. There must be an Overt act to manifest that Offence.

2. That must be made appear by manifest proof, and not by conjectures.

3. He

3. He must be lawfully attaint thereof, either by Confession or by his Peers in his life time.

And therefore if a Person be slain in open War he forfeits nothing, neither can he be attaint in such case, but by Parliament.

2. Thus far of Treasons relating to the King immediately; now follows that which is *Interpretative Treason.*

§ *Killing* the Chancellor, Treasurer, Justice of one Bench or other, Justice in Eyre, or of Assise, or Oyer and Terminer in their place, doing their Offices.

1. This *extends* but to the Persons here named, not to the Lord Steward, Constable, or Marshal, or Lords of Parliament.

2. It extends to these only doing their Office.

3. It extends only to a killing, not a wounding without death.

But by Stat. 3 *H.* 7. *c.* 14. compassing to kill the King, or any of his Council made Felony.

3. *Counterfeiting* the Great Seal or Privy Seal.

1. It must be an actual counterfeiting: therefore compassing to do it no Treason.
2. Affixing the Great Seal by the Chancellor without Warrant no Treason.
3. Fixing a true Great Seal to another Patent is a great Misprision, but not Treason; nor a Counterfeiting within this Statute, 2 *H.* 4. 25.
4. Aiders and Consenters to such Counterfeiting are within this Act.
5. The Counterfeiting of the Privy Signet or Sign Manual not Treason within this Act, but made so by the Statute of 1 & 2 *P. M.* c. 11.

V. Trea-

V. Treaſon concerning the *Coin.*

1. *Counterfeiting* the Kings Coin. This was Treaſon at Common Law, but yet the Judgment was only as in caſe of Petit Treaſon: and this being but affirmance of the Common Law.

Vide Si Mr. de Mint fait de memi allay, &c. eſt Treaſon. 3 H. 7. 20.

But whereas *Clipping*, &c. is made High Treaſon by ſubſequent Statutes, the Judgment is to be hang'd, drawn, and quartered, becauſe introductive of new Law.

Herein conſiderable.

1. What ſhall be a *Counterfeiting?* Clipping, Waſhing, and Filing of Money for lucre or gain, any of the proper money of the Realm, or of other Realms, allowed to be current by Proclamation, not within this Statute; but made High Treaſon by Stat. 5 *El. c.* 11. but no corruption of blood or loſs of Dower.

Impairing, Diminiſhing, Falſifying, ſcaling or lightening the proper money of this Realm, or the money of any other Realm

made currant by Proclamation, their Counſellors, Conſenters, and Aiders within neither of the former, but made Treaſon by the Stat. of 18 *El.* 1. but without corruption of Blood, or loſs of Dower.

2. What his *Money?*

This extended only to the proper Money of this Realm:

But now,

1 *Ma. c.* 6. Forging or Counterfeiting Money made *currant* by Proclamation, is High Treaſon.

14 *El. c.* 3. Forging of Foreign Coin *not currant* here; Miſpriſion of Treaſon in the Forgers, their Aiders and Abettors.

And Note, the *bare forging* of the King's Coin, without uttering, is Treaſon. 6 *H.* 7. 13.

Mes uttering de faux money fait deins le Realm ſciant ceo deſire fals eſt ſolment Miſpriſion de Treaſon, 3 H. 7. 10. *Iſſint Receaving, Aiding, &c. ceſtuy que ad counterfeit*, Dy. 296.

Nota,

Nota, Eſt grand Miſpriſion, mes nemy Miſpriſion de Treaſon, & iſſint reſolve 1661.

2. The ſecond Offence concerning Money declared Treaſon is, if any Perſon *bring into the Realm* counterfeit Money.

1. It muſt be Counterfeit.

2. Counterfeit to the ſimilitude of *Engliſh* Money.

3. Brought from a Forreign Realm, and therefore not from *Ireland* barely.

4. Brought knowingly.

5. Brought in, and not barely uttered here: But if falſe or clipt Money be found in his hands, by the Statute *De Moneta* if he be ſuſpicious, he may be arreſted till he have found his Warrant.

6. He muſt merchandize therewith, or make payment thereof.

Certain High Treaſon made by ſubſequent Statutes in force.

5 *El. c.* 1. Refuſing Oath of Supremacy upon the ſecond tender Treaſon, without corruption of Blood.

Extolling power of Bishop of *Rome* Premunire, 13 *El. c.* 2. Bring in Bulls, or putting in execution, or reconciling to the See of *Rome* thereby, Treason.

Bringing in *Agnus Dei*, &c. Premunire, 1 *El. c.* 1. V. *Dy.* 282.

§. 23 *El. c.* 1. Absolving Subjects from Obedience, or reconciling them to Obedience of *Rome*: Treason in Reconciler and Reconciled.

§. 27 *El.* 2. Priest coming into the Realm, not submitting in two days, Treason. The like for *English* in Forreign Seminaries.

Petty

Petty Treason.

IS confined by Stat. 25 E. 3. to three *Particulars*:

1. Where a *Servant kills* his Master.

This extends to some other Cases:

1. Servant kills his Mistress.
2. Servant kills his Master's Wife.
3. Where a Servant, upon Malice taken during his Service, kills his Master after departure from his Service.

2. *Wife killing* her Husband.

If the Wife and a Stranger kill the Husband, petty Treason in the Wife, Murder in the Stranger.

If the Wife or Servant procure a Stranger to kill her Husband or Master, the Procurer accessary only to Mur-

der: But if she procure a Servant to do it, Treason in both.

3. *Ecclesiastical Person*, Secular or Regular, kills Superior.

Note, Aiders and Abetters and Procurers to Petty Treason are within this Act.

V. C. P. 20. Crom. 18. Dal. c. 91. H. 5. Car. *Doddington's* Case.

This Act not taken by Equity. Yet Son kills Father or Mother, it is Petit Treason, receiving Meat, Drink or Wages.

The *Judgment* in Petty Treason for a Man to be hang'd and drawn.

A Woman to be burnt.

Crom. 18.

Whatsoever will make a Man guilty or principal in Murder, will make a man guilty or principal in Petit Treason.

Dal. c. 91.

But if the Servant kill the Master upon a sudden falling out, this is not Petit Treason, but Manslaughter.

Crom. 19. *Bigg's* Case.

If the Servant or Wife be of Confederacy to kill the Husband or Master, and be in the same House, though not in the same Room, they are principals and guil-

ty

ty of Petit Treason, for it is a pre-

Servant tue Mr. per procurement le Feme absent: il est Petit Treason in Servant, & Accessory al Petit Treason in Feme. 2. Si Estr. fait ceo per procurement Feme ou Servant: est Murder in l' Estr. & Accessory al Murder in Feme ou Servant. 3. Si Estr. fait ceo per procurement & in presentz de Feme ou Servant: est Pet. Treason in Feme ou Servant, & Murder in l' Estr. Dy. 332. 254. 328.

Of Felonies: and 1. Of Felonies of the Death of a Man.

THus far of High and Petit Treason.

Now for Felonies, they are either by Common Law, by Statute.

Felonies *by Common Law*: and they are of four kinds.

1. Such as are committed against the Life.
2. Such as are against the Goods of a Man.
3. Such as are against the Habitation of a Man.
4. Such as are against the Protection of Publique Justice.

Felonies committed *against the Life* of two Natures.

1. That which is committed against his own Life, *Felo de se.*
2. Committed against anothers Life:
   1. Involuntary.

1. *Per*

1. *Per infortunium*, and therein of Deodands.
2. *Per neceſſitatem.*
   In defence of Juſtice.
   In defence of ſelf.

2. Voluntary, without Malice.
   With Malice.

Felo De Se.

1. THe *Perſon.*

1. As in other Felonies, ſo in this, the Perſon that commits it muſt be of age of diſcretion, and *Compos mentis*; otherwiſe no Forfeiture: Therefore if a Lunatick, during his Lunacy, a Man diſtract by force of Diſeaſe, or *Non compos*, kill himſelf, no Felony.

2. As in other Felonies the death muſt enſue within a year and a day after the ſtroke, &c.

2. The *Act* may be voluntary. Involuntary in ſome caſes.

If *A.* aſſault *B.* and *B.* falling down with his knife drawn, *A.* in purſuit to kill *B.* by haſte falleth upon the knife, *A.* is *Felo de ſe*, and forfeits his Goods.

St. PC. 56. Dalt. c. 92.

But

But if *B.* were ſtanding in his Defence with his knife drawn, *A.* runs upon the Weapon and kills himſelf, *A.* is not *Felo de ſe.* C. P. C. P. 54.

3. The *Conviction.*

1. If the Body can be ſeen, then the Conviction before Coroner, *ſuper viſum Corporis*, and not traverſable.

2. If not ſeen, then before the Juſtices of the Peace, and then traverſable by the Executor or Adminiſtrator. C. P. C. 55.

In the ſame manner, if enquired in *B. R.* in ſame County, traverſable.

4. The *Forfeiture:*

1. Where? By the Conviction.

2. How relating? To the ſtroke.

Therefore, Villain gives himſelf a mortal ſtroke; Lord ſeiſeth goods; Villain dies; King ſhall have them.

3. Of what?

Joint things intire, all forfeited, unleſs in caſe of Merchants. C. PC. 55.

Joint things ſeverable, Moiety forfeit.

But

But Joint Chattels in Husband and Wife, all Forfeit for this Offence of Husband.

Chance-

Chancemedley.

FElony for the death of another, either involuntary, or voluntary.

Involuntary *per infortunium*; *Ex neceſſitate*.

Involuntary *per infortunium*.

Chancemedley, where a Man doing a lawful act, without intent of hurt to another, and death caſually enſues:

As, ſhooting at Rovers, or at a Bird, or hewing a Tree and the Hatchet-head flies off.

A School-maſter in reaſonable manner beating a Scholar, or Father his Son, or Maſter his Servant. Ct. 26.

Doing a lawful thing that may breed danger, and giving warning; Juſting by command of the Prince.

But if the act be unlawful, then death enſuing Manſlaughter or Murder.

Shooting at a Deer in anothers Park, the Arrow glanceth and killeth a ſtander by, Manſlaughter. C. P. C. 56.

Throw-

Throwing ſtones or ſhooting in the High-way, and death enſuing, Manſlaughter.

C. P. C. 57. But if a man, knowing people paſſing by in the ſtreet, throw a ſtone over the wall, Murder.

Dalt. c. 96. Playing at Hand-ſword without command of the King, death enſuing, Manſlaughter.

So that an unlawful act, without an ill intent, Manſlaughter; with an ill intent, Murder.

St. PC. c. 15. And this cauſeth forfeiture of Goods; but a Pardon of Courſe upon the Special matter found.

Deodand.

Deodand.

But there is a death *per infortunium* without the default or procurement of another: fall from a Tree, or by a Horſe or Cart: and there thing that occaſions the death is Forfeited and *Deodand*: wherein conſiderable,

1. *What Forfeited* as a Deodand.

1. If a man fall from a Cart, or from a Ship in Freſh-water, it is a Deodand; otherwiſe in Salt-water. C. P. C. 58.

2. If an Infant under fourteen be ſlain by fall from a Cart, Horſe, or Mill, no Deodand; but if ſlain by a Horſe, Ox, or Bull, then a Deodand.

3. If a man kill another with any Sword, a Deodand. Dalt. Inſt. c. 97.

2. *When* forfeited, viz.

When found by Inquiſition, therefore the Jury ought to find Dalt. c. 97.

the price; and this is before Coroner.

3. The *Relation* of the Forfeiture is to the ſtroke.

Homicide

Homicide ex Neceſſitate.

THis of ſeveral ſorts:

1. In reference to Juſtice.

2. In defence of his Perſon, Houſe, Goods.

Homicide *ex neceſſitate.*

§. 1. *In reference to Juſtice*, of ſeveral kinds:

1. In execution of Juſtice.

2. In advancement of Juſtice.

Homicide *in Execution of Juſtice* requires certain preſcripts.

1. That the Judgment be given by one that hath Juriſdiction in the Cauſe.

If a Juſtice of Peace give Judgment in Treaſon, the Execution thereof Murder in Judge and Officer. Dal. c. 98.

But if he give Judgment of death in Treſpaſs, Felony in the Judge, but not in the Officer that executes it.

2. That it be done by a lawful Officer.

Therefore if a Stranger of his own Dal. c. 98.

own head, or the Judge that gives the Judgment, Execute it, where it is to be done by the Sheriff, Felony.

3. That it be done purſuant to the Judgment.

St. PC. c. 4. Judgment to be hang'd, Sheriff beheads him, Felony.

2. Homicide *in advancement of Juſtice* in Cauſes.

{ Criminal, / Civil.

1. In Cauſe *Criminal.*

If a Sheriff or Bailiff, having warrant to arreſt a Perſon indicted of

Dal. c. 98. Felony, and he will not obey, or ſuffer himſelf to be arreſted, the Bailiff kills him, no Felony.

Cro. fo. 27. The ſame if any Perſon that purſues upon Hue-and-Cry, or otherwiſe to arreſt a Felon that flies.

C. PC. 221. If a Felon arreſted break away from his Conductors to Goal, they may kill him, if they cannot otherwiſe take him.

But

But in this latter Case there must be a Felony done.

If a Prisoner assaults his Goaler, and he kill the Prisoner, no Felony.

Rioters or forcible Enterers or Detainors, standing in opposition to the Justice's lawful warrant, and one of them slain, no Felony.

Keeper or Parker may kill Hunters, if they fly or defend themselves. Cr. f. 28.

Champion in vre de dret, ou Combatant in Appele, excuse in killing the other.

2. In *Civil* Causes.

Though Sheriff cannot kill a man who flies from the execution of a Civil Process, yet if he resist the arrest, the Sheriff or his Officer need not give back, but may kill the Assailant. C. Pl. c. 56.

3. So if in the arrest and striving together, the Officer kill him, no Felony.

Now touching all the former Homicides theſe *things obſervable:*

1. There muſt be no malice coloured under pretence of neceſſity; for if it be, it alters the Caſe, and makes it Murder.

2. The Party that did the Fact muſt be arraigned, and upon *Not Guilty* pleaded, the Special Matter muſt be found.

3. Upon this Special Matter thus found, the Party is to be diſmiſt without any forfeiture or pardon purchaſed.

2. THus of Homicide *ex necessitate* in reference to Publique Justice: Others there are that are grounded upon *Private Interest*, and they of two kinds:

1. *Justifiable*, and consequently inducing no forfeiture at all, nor needing pardon.

2. *Excusable*, and yet inducing a forfeiture.

1. *Justifiable* and inducing no forfeiture, where a Person comes to commit a known Felony.

1. If a man come to burn my House, and I shoot out of my House, or issue out of my House, and kill him, no Felony. Dal. c. 98.

2. If a Woman kill him that assaulteth to ravish her, no Felony.

3. If Thieves assault me in the High-way, or in my House to rob me, and I, or my Servant kill them, no Felony nor Forfeiture. 24 H. 8. c. 5.

But if the assault in my House were not to kill me, but to beat me, &c. there would be only *Se defendendo*, and goods forfeited, and a Pardon of course to be granted, because (they) came not to commit a known Felony; for it cannot be judged whether he meant to kill me.

Dal. c. 58. If one come to enter into my house, claiming Title, and I kill him, Manslaughter.

Crom. 23. If *A.* enter wrongfully into the house of *B.* riotously and forcibly, *B.* and others indeavours to fire the house, *A.* kills, Manslaughter.

Se defendendo.

HOmicide *Excuſable Se defendendo*, which though it ſave the Life, yet the Goods are forfeited; this requires theſe things:

1. It muſt be an inevitable neceſſity.

In caſe of a juſtifiable Homicide, as of a Thief that comes to rob me, or by an Officer reſiſted in Executing an Arreſt, the Party need not give back to the Wall. C. P. C. f. 56.

But in this Homicide *ſe defendendo*, the Party that is aſſaulted not excuſed, unleſs he give back to the Wall. C. P. C. 57.

But if the aſſault be ſo fierce, and in ſuch a place that giving back would endanger his life, then he need not give back. C. P. C. 57.

A man fights, and falls to the ground, then flying not neceſſary. Dalt. c. 98.

2. It muſt be in his defence.

If *A.* be aſſaulted by *B.* and before a mortal wound given *A.* gives back C. P. C. 56.

back till he come to the Wall, and then in his defence kills *B.* this is *Se defendendo.*

But if the mortal wound firſt given, then Manſlaughter.

Dal. c. 98. Crom. 26. If *A.* upon malice *præpenſe* ſtrike *B.* and then fly to the wall, and there in his own defence kills *B.* this is Murder.

But if there be malice between *A.* and *B.* and *A.* ſtrike firſt, *B.* retreats to the wall, and in his own defence kills *A.* this is *Se defendendo.*

If malice be betwixt *A.* and *B.* and *A.* aſſaults *B. B.* retreats to the wall, and then kills *A.* in his own defence; if it be in the Highway he ſhall be diſcharged, but if not, yet it is *Se defendendo. Copſton's* Caſe. Crom. fo. 25.

Murder.

Murder.

THus far of Homicide Involuntary:

Homicide *Voluntary* is either:

Ex malitia præcogitata, which is Murder.

Sine malitia, Manſlaughter.

Murder is when a perſon killeth another of malice within any County in *England*, ſo he die within a year and a day.

1. Who ſhall be ſaid a *perſon killing?*

A man that is *Non compos* kills another, this is no Felony. Dalt.

§. The ſame for a Lunatick during his Lunacy.

But he that incites a *mad-man* to kill another is a principal Murderer.

A man *drunk* killeth another, this is Felony.

An *Infant* within age of diſcretion kills a man, no Felony; as if he be nine or ten years old.

But if by circumſtances it appeareth

Crom. 27. eth he could distinguish between Good and Evil, it is Felony; as if he hide the dead, make excuses, &c.

St. PC. c. 9. But in such Cases Execution in prudence respited to obtain a Pardon.

2. What said *Malice?*

It is either implied or expressed.

Implied malice is collected either from the manner of doing, or from the person slain, or from the person killing.

1. Malice implied *in the manner* of doing.

Poysoning wilfully any man, implies malice.

C. PC. 52.

If a man do an act that apparently must introduce harm, and death ensue; as to run among a multitude with a Horse used to strike.

Dal. c. 93.

But note, that if it were with an intention to do harm, then Murder; if without such intention, Manslaughter.

The like of throwing a stone over a house among many people, the intention of doing harm makes it

it Murder; want of such intention, Manslaughter, because the act unlawful.

For an Intention of evil, though not against a particular person, makes a malice.

Killing any person without provocation, Murder.

A. comes to rob *B.* *B.* resists and strikes, *A.* kills him, Murder.

A. Distorts his mouth, and laughs at *B.* who thereupon kills him, Murder. M. 42. 43 El. Brames Case.

2. Malice implied *in respect of the person killed.*

If a Watchman or Constable, or any that comes in his assistance, doing their Office, be killed, it is Murder, though the killer knew not him to be such. 4 R. Hamdens Case, Youngs Case.

If any Magistrate or Minister of Justice, having a lawful Warrant, be killed, doing his Office, it is Murder: As where a Serjeant comes to Arrest,

1. Though in the Night.
2. Though on Sunday.
3. Though upon the Arrest he

he ſhew not out of what Court, or whoſe Suit.

9 Rep. Mackallys Caſe.

4. Though the Proceſs Erroneous.

5. Though he ſhew not his Warrant or Mace where it is not demanded.

But if the Officer do what is not warrantable, as break open a window to arreſt, there though ſlain, Manſlaughter only, *P.* 15 *Car. Cooks* Caſe.

Malefactors come into a Park, the Parker ſhoots, they fly, he purſues, they kill him, Murder in all; for their firſt entry was with a malitious intent. M. 17 *Jac. Vſrans* Caſe.

3. Malice implied *in reſpect of the perſon killing.*

A. aſſaults *B.* to rob him, *B.* reſiſts, *A.* kills him, Murder.

Priſoner by Dureſs of the Goaler comes to an untimely end, Murder.

Executing Martial Law in time of Peace, Murder.

2. Malice

2. Malice *Expreſs* conſiderable,
1. In the principal in the firſt degree that doth the act.
2. In the principal in the ſecond degree, that is preſent and aiding, or abetting.
3. In the Acceſſory before the Fact.

1. In the Principal in the firſt degree.

1. If a perſon have no particular malice againſt any ſpecial perſon, but comes with a general reſolution againſt all Oppoſers, if the act be unlawful, and death enſue, it is Murder: As if it be to commit a Riot, to enter into a Park, Lord *Dacres* Caſe. Crom. 20.

2. If there be malice between *A.* and *B.* and they meet and fight upon that malice, though *A.* gives firſt blow, yet if *B.* kill him, it is Murder. Crom. 21.

If there be malice between *A.* and *B.* and *A.* aſſault *B.* and after *A.* flies to the wall, and there in his own defence kill *B.* by ſome this is Murder, but *Quære.*

If

If there be quarrel between *A.* and *B.* and *A.* challenge *B. B.* declines it, but at length upon importunity, and to vindicate his Reputation, meets and fights, and kills *A.* this is Murder, P. 14 *Jac. Taverner's* Caſe.

If *A.* and *B.* fall out upon a ſudden, and they preſently agree to fight, and each fetch a Weapon and go into the field, and one kills the other; this only Manſlaughter, becauſe the blood never cooled: but otherwiſe if they appoint to fight the next day.

C. PC. 57. 55.

Laurence Caſe. 38 *Eliz.*

A. and *B.* fall out, *A.* ſaith he will not ſtrike, but will give *B.* a pot of Ale to touch him, *B.* ſtrikes, *A.* kills him, Murder.

If *A.* and *B.* are in malice, and *A.* challenge the field, and *B.* refuſe to meet, but ſaith he ſhall go to morrow to ſuch a Town, *A.* meets him, aſſaults him, and *B.* kills him, Manſlaughter, and no Murder.

H. 9 *Jac.* Rawly's Caſe.

The Child of *A.* beats the Child of *B.* who runs home to his Father, and he runs three quarters of a mile, beats

beats the other Child, and he dies, Manslaughter.

3. If malice be not *continuing* till the death, no Murder.

A. and *B.* combat upon malice, and are parted, and after they meet and combat upon the sudden, and one kills the other, by some not Murder, because the first Malice satisfied. Cro. 21.

If the party killed had wounded at the first combat the party slaying, *Quere.*

A. and *B.* are at malice, and reconciled, and after upon a new occasion fall out and kill, no Murder.

4. Though the malice did *not rise so high* as death, but intended only to beat the party, yet if malitious, it is Murder if death ensue.

A Keeper of *Esterly* Park finds a Boy stealing wood, bound him to his Horse-tail and beat him, the Horse ran away, kill'd the Child, Murder, for it was a deliberate act, M. 4 *Car.* B. R. *Holloway*'s Case.

5. The malice intended to one, *egreditur perſonam*, and makes the death of another upon that malice, Murder, and qualifies the act in the ſame manner, as if it had had its due effect.

Dy. 128. *A.* having malice at *B.* ſtrikes at him, and miſſeth, and kills *C.* this is murder in *A.* and if it had been without malice prepenſe, Manſlaughter.

Crom. 101. *Ellys* Caſe. *A.* having malice to *B.* aſſaults him, and kills the Servant of *B.* this is Murder in *A.*

9 Rep. *Gorts* Caſe. *A.* lays poiſon to kill *B.* and *C.* at miſadventure takes it and dies, Murder in *A.* Contrary if it had been laid to kill Rats; then *infortunium.*

A. and *B.* combat upon malice, *C.* comes to part them, *A.* kills *C.* this is Murder, and *per aſcuns*, Murder in both; and if the falling out were ſudden, then only Manſlaughter in him that kill'd him. Vide *Dyer* 128. 20 *E.* 3. *Corone* 262.

6. The Malice muſt be of Corporal damage to the party.

2. Prin-

2. Principals *in second degree*, that are aiding and abetting.

1. If two or more come together to kill, rob, or beat a man, or to commit a Riot, and one of them kills a man, this is murder in all them of that party that are present aiding or abetting him thereunto, or that were ready to aid him, though but lookers on; otherwise if he came there by chance. St. P. C. c. 40.

2. All are said to be present that are in the same House, though in another Room, or in the same Park, though half a mile distant, and out of view; therefore if they came to commit a Felony, such persons aiding or abetting shall be said present. 34 H. 8. B. Coron. 172. M. 17 Jac. Yarnials Case. Crom. 19. Dal. c. 93.

3. *A.* and *B.* fall out, and appoint the field; *A.* takes *C.* his Second, *B.* takes *D.* his Second; *A.* kills *B.* this is doubtless Murder in *C.* and it hath been held Murder in *D.* also, for it is a compact; but it seems otherwise. Dal. c. 93. Dy. 128.

4. If *A.* and *B.* having malice *prepense* meet and fight, and *C.* the

Crom. 100. Servant of *A.* not acquainted therewith, take part with *A.* his Master, and kill *B.* this is Murder in *A.* but only Manslaughter in *C.*

The same Law if *C.* came in suddenly and took part with *A.* and kill'd *B.* V. Sir *Ferdinando Gary's* Case, 14 *Jac.*

Mes si un vient la per chance, & nabette, nest principall, nes accessory al Manslaughter ou Murder, Stamf. 40.

3. What malice in the *Accessary* before the Fact.

A. commands *B.* to kill *C.* with a Gun, he kills him with a Sword, *A.* is accessary to this Murder, because the killing was the substance.

But if he command *B.* to kill *C.* and he by mistake kill *D.* this is Murder in *B.* but *A.* is not accessary thereunto.

A. commands *B.* to beat *C.* who beats him, whereof he dies, this is Murder in *B.* and *A.* is accessary, because death ensues upon the act commanded.

4. What

4. What *Killing?*

Poiſon, Weapon, Gun, Bow, Cruſhing, Bruiſing, Smothering, Strangling, Famiſhing, inciting Dogs.

§. Laying a Sick man in the cold.

Laying an Infant in an Orchard under Leaves, and he ſtricken with a Kite.

A man keeps a Beaſt uſed to ſtrike knowingly, and ties it not up, the Beaſt kills a man, Felony by ſome, by others not, but a groſs miſdemeanour, 3 *E.3. Cor.* 311. St. Dal. c. 93.

5. What the *perſon killed?*

It muſt be a perſon *in rerum natura.*

If a Woman quick with Child take a potion to kill it, and accordingly it is deſtroyed without being born alive, a great miſpriſion, but no Felony; but if born alive, and after dies of that potion, it is Murder.

The like if it dies of a ſtroke given by another in like manner.

§. Counſel before the birth to deſtroy it, and after the Child is born C. PC. c. 7. Dal. c. 93. contra.

Ibid. destroyed accordingly, the counsellor is accessary.

6. What a place *within the Realm?*

Stroke and death *in partibus transmarinis* not punishable at Common Law, but before the Constable and Marshal. C. PC. c. 7.

Stroke and death upon the Sea inquirable before the Admiral, or according to the Stat. of 28 *H.* 8. *c.* 13. But stroke upon the Sea, and death within the Body of the County, not punishable at all.

If the stroke in one County, and the death in another, the party shall be indicted where the death happened.

An accessary in the County of *A.* to a Felony committed in the County of *B.* the accessary after Certificate of the Conviction and Attainder of the principal, may be Arraigned upon an Indictment in the County of *A.* where he was accessary. Stat. 2 *E.* 6. *c.* 24. V. *Formam Processus inde in B. R. C. PC. cap.* 7. *Overburie's* Case.

7. The

7. The party must die *within the year and the day* of that stroke, or poison, &c.

Manſlaughter.

KILLING another upon a ſudden falling out, or provocation, or unjuſtifiable act, Manſlaughter.

1. What a *ſudden falling out?*

C. P. C. c. 8. Two combat and part, and preſently come together and fight, or one preſently fetcheth a Weapon and killeth the other, or they preſently fetch their weapons, and go into the field, and one kills the other, Manſlaughter.

Diverſe Rioters enter into anothers houſe forcibly, and eject the people; afterwards they being in poſſeſſion, the party ejected, with twenty more, come in the night to the houſe, endeavour to fire it, and one within ſhoots and kills one of the aſſailants; ruled to be Manſlaughter, becauſe their entry and holding with force illegal, and not Murder, becauſe a ſudden provocation.

So

So *A.* claims title to the house of *B.* *A.* attempts to enter and shoots at the house; *B.* shoots out and kills *A.* adjudged Manslaughter.

Two fall out and fight, and one breaks his Sword; a stranger standing by lends him another, and he kills therewith, Manslaughter in both. Dal. c. 94.

2. What *a sudden provocation?*

Two strive for the wall, and one kills the other, Manslaughter.

3. What *unlawful act*, whereupon death ensuing will make Manslaughter?

If the unlawful act be deliberate, and tend to the personal hurt of any immediately, or by way of necessary consequence, death ensuing, is Murder.

But if either such deliberation or intent of personal hurt be wanting, Manslaughter.

Two play at Foils, and one kills the other, Manslaughter. Sir *John Chichester's* Case, 13 *H.* 7. 23. *V. Kell.* 108. 136. *Wrestling, & un tu autre.*

A man throws a stone at another, which glanceth and killeth another, Manslaughter; and not Murder, because no malicious intent to hurt; not *per infortunium*, because doing an unlawful act.

There is a particular Manslaughter, wherein Clergy is oust, by the *Stat.* 1 *Jac. c.* 8. wherein,

1. He that is ousted of Clergy by that Statute, must be especially Indicted pursuant to the Statute.

2. It extends to him that actually gave the stroke, not to those that are present.

3. Need not Conclude *contra formam Statuti.*

4. Although the Indictment be special upon the Statute, yet the Jury may find general Manslaughter. H. 23 *Car.* B. R. *Page's* Case.

A Newgat rep. 16 *Car* 2. A man whips his horse in the street to make him run speedily, and the horse runs over a Child, and kills him; Manslaughter: But another whips the horse, whereby he springs out, and runs over a Child, and kills him;

per Infortunium. Nota, Indictment de Murder p ceo que eſt per infortun, ſur non cul. pled, Jury poet trover lui non cul. ſi ſoit Coroners Inqueſt que trove ceo per misfortune & le party ſemſt ceo. Prettye's Caſe.

Larceny.

WE come to Offences Capital, which refer to *the Goods* of any Person, *viz.* *Larceny*, which is of two kinds;

Simple Larceny,

Mixt and complexed Larceny.

Simple Larceny of two kinds:

Grand Larceny, of the value of 12 pence.

Petit Larceny, under that value.

Simple Larceny, a felonious and fraudulent taking away by any person of the meer personal goods of another, not from the person, nor out of his house, to the value of 12 pence.

I. What

I. What shall be said a *Felonious taking*; Import two things:

1. A taking necessary; the Indictment must be *Cepit*; if it be *felonice, Abduxit Equum*, not sufficient.

If a person find goods left, and converts them, though the conversion were *animo furandi*, yet no Felony. C. P. C. 198

If a man hath a *bare charge* of goods, Felony may be by him committed: As a Butler that hath charge of Plate; Shepherd of sheep; the like of him that hath a *bare special use*, as the guest that hath Plate set before him.

But he that hath a *possession by delivery* cannot thereof commit Felony.

A Carrier hath goods delivered to him, and he carries them away, no Felony.

A. lendeth his horse to a Stranger, who rides away, no Felony.

A Clothier delivers Yarn to a Weaver

Weaver to weave, he carries it away, or imbezels it, no Felony.

But this hath two Exceptions:

1. If the privity be determin'd, then it may be Felony.

A. delivers a Pack or a Tun of Wine to a Carrier, he opens it, and takes out Goods or Wine, *animo furandi*, Felony.

So if *A.* deliver goods to *B.* to carry to a certain place, he carries it to the place appointed, and after takes it *animo furandi*; Felony.

2. By Stat. 21 *H.* 8. *c.* 7. whereby if a Servant goes away with the goods of his Master delivered to him above value of 40 shillings, herein

1. Extends not to Apprentice, nor Servants within eighteen years.
2. Requires a Delivery.

C. PC. c. 44. Dalt. c. 102.

If one Servant deliver the goods to the other, this a delivery by Master.

If

If the Maſter deliver an Obligation, or deliver Cattel to ſell, and the Servant receive the money and depart with it, it is no Felony; the like if he had gone away with the Obligation.

3. He muſt go away with it. Waſtfully conſuming, &c. thereof, no Felony.

4. Now by the Stat. of 1 *E.* 6. *c.* 12. he may have his Clergy.

5. He muſt be a Servant at the time of the delivery, and going away; therefore for imbezelling after Maſter's death, Stat. 33 *H.* 6. *c.* 1. gives remedy.

6. If a Servant receive his Maſters Rents, and go away with them, not within the Statute.

If a man, ſeeing a Horſe in the Paſture of the Owner, having a mind to ſteal him, obtains a Replevin, and thereby hath the Horſe delivered, this as Felonious taking. C. P. C. 47.

If

If *A.* feloniously take my Horse, and *B.* feloniously takes him from him, *B.* may be appealed or indicted as of a felonious taking from me.

Crom. 34.

§. Stat. 33 *H.* 8. *c.* 1. False token.

Un prist feme de I. S. oue ses biens countre le volunt, est Felony : Contra si feme prist les biens le baron & ala oue estr. de sa bone volunt. 13. Ass. 6. *Issint si feme covert prist biens le baron, ou eux dona al estr. que eux import, nest Felony.* Abridg. Ass. 63.

II. What a *carrying away?*

C. P. C. c. 47.

A Guest takes sheets out of the bed, brings them into the Hall with an intent to carry them away, but is apprehended before this; a carrying away.

A. takes the horse of *B.* with an intent to steal him, but is apprehended before he can get out of the Pasture; this taking away.

Crom. 33.

A. kills my sheep, strips them, carries away their skins, Felony; so if he pull off their wooll.

III. *By*

III. *By whom?* and who such a person as may commit Larceny?

An *Infant* under fourteen years may commit Larceny; but prudence to reſpite Judgment; yet one under fourteen burnt in the hand. Preſidents. Dal. 104.

A *Feme covert* by her own act may commit Larceny, and in ſuch caſe the husband may be Accellary to the wife in receiving her; but not *e converſo*.

But ſhe cannot feloniouſly take her husband's goods; and though ſhe ſo take her husbands goods, and deliver them to a ſtranger, yet no felony in the ſtranger.

If husband and wife do both a felony, this is felony in both, and both arraigned for it. Dal. 104.

Nota, Books old and latter, and Practiſe, *contra*.

If the wife commits murder by coercion of her husband, murder in both; but if theft, no Felony in

her; but a bare Command excuſeth her not.

But if a *Servant* commit theft by coercion of his Maſter, yet it is Felony.

IV. What meer *perſonal Goods?*

1. If they are in the realty, or annexed thereunto, no Larceny: As Corn or Graſs growing, Apples on Trees. Dal. c. 47.

§. Stealing a Cheſt of Charters, no Felony, though the Cheſt above value.

Taking Lead off a Church no Felony; otherwiſe if he leave it a while, and after come and take it.

Taking an Infant Ward no Felony.

2. If they are of a baſe Nature, as Maſtiffs, Dogs, Bears, Foxes, Monkeys, Ferrets, or their Whelps, there can be no Felony of them; but of Hawks reclaimed Felony may be.

V. What

V. What ſaid the *Goods of another.*

1. He that hath a ſpecial property, as a Bailiff, &c. they are his goods *pro tempore*. *A.* bails goods to *B.* and after to the intent to charge *B.* ſteals them from him, Felony in *A* 21 *H.* 7. *Kel.* 70. *Cloth in maines Taylor.*

2. He that takes the goods of a Chappel in time of vacation, indictable *quare bona Capellæ*; ſo *bona Parochianorum*, *bona mortui*, or *bona ignoti*, *&c.* Dal. 103.

So to ſteal the ſhroud off a perſon buried; and it ſhall be *bona executorum*. V. *Tamen contra*, 15 Jac. *Nottingham's* Caſe. C. P. C. c. 47.

But taking of Treaſure trove, Wrecks, Waifs and Strays before ſeiſure, no Felony.

Taking an Obligation Felony, becauſe in action.

Taking fiſh in a River no Felony, but fiſh in a Net, Trunk, or Pond, Felony, becauſe not at their natural

liberty: So of old Pigeons out of the house.

Where a man hath a property only *ratione loci*, or *privilegii*, in things *feræ naturæ*, as Coneys or Deer in my Ground, Park, or Warren, no Felony.

But if reduced to tameness, and fit for food, as Deer, Coneys, Cranes, Partridge, Pheasants, he that stealeth them, knowing them tame, committeth Felony.

Mes sil ne conusant dēe tame, nest Felony. V. *M. Charta.* 201.

So of Swans marked and pinioned, or Swans unmarked if tame, kept in a Mote, Pond, or private River.

Where a man hath a property *ratione impotentiæ* in things wild by nature, as young Hawks in the nest, young Pigeons in the nest, Felony thereof.

Taking of Eggs of Hawk or Swan out of the ground of another, no Felony, but punishable by Statute.

But taking any thing *domitæ naturæ*, as Duck, Hen, Geese, Turkeys, Peacocks, or their Eggs; or Domestick

ſtick beaſts, as Horſes, Mares, Colts, &c. or their young, Felony.

VI. Where this ſhall be ſaid a *felonious taking*.

If *A.* ſteal goods in the County of *B.* and carry them into the County of *C.* he may be appealed or indicted in the County of *C.* for Larceny, but can be indicted of Robbery only in the County of *B.* only in the former caſe the Stat. of 25 *H.* 8. *c.* 1. ouſts them of their Clergy, if they were not to have had Clergy if arraigned in the County of *B.* where the Robbery committed. Crom. 34. V. 4 H. 7. 5.

Si gueſt priſt ſheets hors de lect feloniouſly, & eux import in hale, & la ſur fear de purſuit relinquiſh eux, Felony. 27. Aſſ. 39.

VII. Of the *value* of twelve pence or above.

1. *Nota*, That in caſe of Grand Larceny it muſt be above the value of twelve pence; and if it be but Weſt. 1. c. 15. 21 Jac. c. 6.

of the value of twelve pence, or under, it is Petit Larceny.

2. If two ſteal goods to the value of thirteen pence, this is grand Larceny in both.

Dal. c. 101. Crom. 36. St. P. C. 24.

3. If one perſon at ſeveral times, at one time ſteal four pence, at another ſix pence, at another three pence, in all amounting to above twelve pence, from the ſame perſon, all theſe put together in one Indictment, amount to grand Larceny; and Judgment of death.

4. If a man be indicted of ſtealing goods to the value of ten ſhillings, and the Jurors find ſpecially, as they may, the value but ten pence, 'tis but petty Larceny, and no Judgment of Death.

And note, petty Larceny is Felony, though not of death, and for this he ſhall forfeit Goods, and be ſubject to whipping or other Corporal puniſhment. *Aſſint ſi furgam fecit furt biens.* Coron. 106.

Robbery.

COmplicated or mixt Larceny, which hath a further degree of guilt in it.

1. For that it is a taking from the person.

2. For that it is a taking out of the house.

1. Taking *from the person.*

1. Where the person is put in fear, and then 'tis Robbery.

2. When not put in fear, and then 'tis Larceny from the person.

Robbery is a felonious and violent taking away from the person of another money or goods to any value, putting him in fear.

1. *Violent and putting* him *in fear*; the words of the Indictment run, *violenter & felonice*, and that distinguishes him from a Cut-purse.

2. *Taking away.*

1. An assault to rob without any taken, is no Felony.

If a Thief, with or without weapon drawn, bid the party deliver his Purſe, and he doth it; this is a taking to make it Robbery.

Crom. 31. If a Thief command to deliver his purſe, and he deliver, and the Thief finding little in it, deliver it back, this is Robbery.

C. CP. c. 16. If a Thief compel the true man by fear to ſwear to fetch him a ſum of money, which he doth accordingly, and the Thief receives it, it is Robbery.

If the true man's purſe be faſtned to his girdle, the Thief cuts the girdle, the purſe falls to the ground, no Robbery; but if the Thief take up the purſe, though he let it fall again, Robbery, though he never take it up more.

All that come in company to rob Principals, though one only actually do it.

A. B. and *C.* aſſault *D.* to rob him in the High-way, but rob him not, for that he eſcaped: *A.* rides from the reſt, in the ſame High-way, and

Crom. 34. robs *E.* out of view of the reſt, and came

came back to the rest, and for this *B.* and *C.* arraigned and hanged, though assented not, because they all came to the end to rob. *Pudsey's* Case.

3. Taking *from the person.*

If the true man, seeking to escape, cast his Purse into a Bush, or let fall his Hat, if the Thief take it, Robbery.

Taking a thing in the presence, is in law a taking from the person.

If one take or drive my Cattel out of my Pasture in my presence, this is Robbery, if he make an assault upon me, or put me in fear. Dal. c. 101.

But if he take any thing from my person, without putting me in fear by assault or violence, no Robbery; and the Indictment runs that he took it from the person violently and feloniously, putting him in fear. Dalt. ibid. Dy. 224. Dal. ibid.

4. Of what *value* soever. C. PC. c. 16.

Though under twelve pence.

Mes in foren County in tiel case Petit Larciny, car n'est Robbery la. 2 Jac. *Moor's* Rep.

Now though Robbery and simple

ple Larceny are both Capital, yet they differ in these Respects:

1. The Principal and Accessary before are ousted of Clergy, but not in simple Larceny.

§. Stat. 23 H. 8. c. 1. 1 E. 6. 12. 23 H. 8. 3. 4 & 5 Phil. & Ma. c. 4. Note, speaks of Robbery in or near the High-way.

2. In the form of the Indictment:

An Indictment of Robbery supposeth an assault, beating and wounding, and taking from the person *felonice*; or at least assault and putting in fear, *felonice & violenter cepit a persona*: Other Indictments, though of a taking from the person, yet not *violenter*.

3. In case of other thefts, though from the person, not felony of death, unless it exceed twelve pence: But here it is Felony of death if never so small.

Larceny from the Perſon.

LArceny from the perſon *without putting in fear*; which may be either by picking the pocket, or cutting the Purſe, which is ſuppoſed to be done *clam & ſecrete a perſona*.

In this Caſe by the Stat. of 8 *El. c.* 4. If the Indictment purſue the the Statute, which is ſecretly without the knowledge of the party, *clam & ſecrete*, he is ouſted of his Clergy.

But if it be under value of twelve pence, then it remains petty Larceny, as before; for the Statute did not alter the Offence, though it took a Privilege. C. P. C. c. 86. Crom. 103.

Larceny from the perſon, which is neither *clam & ſecrete a perſona*, nor with putting in terror, nor ſo laid in the Indictment, nor ſo found by the Jury, Clergy. *Dyer.* 224. 17 *Jac. Harman's* Caſe.

Larceny

Larceny from the House.

LArceny receives another aggravation when it is taken *from the Habitation* of a man.

Per Stat. 23 H. 8. c. 1. Robbing any perſon in their dwelling-houſe, the owner, his wife, or children, or ſervants being within, and put in fear, ouſted of Clergy in caſe of Conviction, together with Acceſſaries before, by Stat. 23 *H.* 8. *c.* 1.

Felonious taking of goods to the value of five ſhillings out of any dwelling-houſe or out-houſe, though no perſon within, ouſt of Clergy, by 39 *El. c.* 15.

Theſe have a mark upon them as Larcenies complicated, and ſo ouſt of Clergy. V. *Infra Clergy.*

Piracy.

Piracy.

TO this we may add Piracy and Depredation upon the Sea.

This at Common Law conceived petty Treason, if done by a Subject. C. P. C. c. 49.

But this alter'd by Stat. 25 *Ed.* 3.

Since that Statute an offence triable by the Civil Law till 28 *H.* 8. 15.

The Stat. 28 *H.* 8. alters not the offence; but it remains only an offence by the Civil Law: and therefore a pardon of all Felonies doth not discharge it: but it gives a trial by the course of Common Law:

1. It extends not to the Accessaries: but if the Accessary were at Sea, triable by the Civil Law; if at Land, by no Law: for Stat. 2, 3 *E.* 6. extends not to it.

2. It extends not to Offences in Creeks or Ports within the Body of a County, because punishable by the Common Law.

3. Though

3. Though it give forfeiture of Life, Lands, and Goods, yet no Corruption of Blood.

4. *Paine fort & dure* in case of standing mute.

Burglary.

Burglary.

3. WE come to the offences *against the dwelling or habitation*; and that of two *kinds*:

1. Burglary.
2. Arſon, or Burning.

Burglary by the Common Law is, where a perſon in the night time breaketh and entreth into the Manſion-Houſe of another, to the intent to commit ſome Felony within the ſame, whether the felonious intent be executed or not.

I. What ſhall be ſaid *in the Night?*

By ſome after Sun-ſet and before Sun-riſing it is night. *Dal. c. 99.*

But it ſeems that ſo long as the Countenance of a perſon may be diſcerned it is day. *Coron. 293.* C. P. C. c. 14.

II. What

II. What *Breaking and Entring?*

The Entring into a house by the doors open is a Breaking in Law; but here not sufficient without an actual breaking: Therefore if the door be open, or window be open, and the Thief draw out Goods thereby, no Burglary.

But if the Thief break the window, draw the latch, unlock the door, break a hole in the wall, these are Breaking.

And as there must be a Breaking, so there must be an Entry:

Setting the foot over the threshold;

§. Putting the hand, or a hook, or a pistol within the window, or door;

Turning the key where the door is locked on the inside;

§. An Entry.

In some cases Burglary without actual breaking.

Divers

Divers come to commit Burglary, and one does it, the rest watch at the Lanes end, Burglary in all.

A Thief goes down a Chimney to rob, Burglary. Crom. 36.

Thieves having an intent to rob, raise Hue-and-Cry, and bring the Constable, to whom the owner opens the door, and when they come in, they bind the Constable and rob the owner, Burglary. C. PC. 14.

A Thief assaults the house, the owner for fear throws out his money, it seems not Burglary, but only Robbery.

A Thief gets in by the doors open in the day, lies there till night, then robs and goes away; no Burglary: But if he break open the door to go out, Burglary. Dal. 99.

The Servant opens the window to let in a Thief, who comes in and steals, Burglary in the Stranger, but Robbery in the Servant. Dal. ubi supra.

If *A.* enter into the Hall by the doors open, the owner retires to a Chamber, and there *A.* breaks in, this is Breaking and Entring.

If Thieves enter into a houſe through a hole made there before, no Burglary.

A. lies in one part of the Houſe, *B.* his ſervant in another, between them a Stair-foot-door latched, the ſervant in the night draws the latch, and enters his Maſters Chamber to murder him, Burglary.

Trin. 16 Jac. *Edmond's* Caſe.

III. What *a Manſion Houſe?*

The Church a Manſion Houſe within the Law.

§. The Out-buildings, as Barns, Stables, are parcel of the Manſion houſe, and Burglary may be committed in them.

Nota, *L'uſe ore eſt, ſi ſoit un Barne ou Stable* disjoyned at any diſtance from the houſe, *neſt Burglary.*

Burglary may be committed in a Manſion houſe, though all perſons be out upon occaſion.

So if a man hath two houſes, and ſometimes lives in one, ſometimes in another.

A ſhop parcel of a Manſion houſe.

A Chamber in an Inns of Court, where a perſon uſually lodges, a Manſion houſe.

But a Booth is not, and therefore remedy ſpecially provided *per Stat.* 5 *E.* 6. *c.* 9.

But an Indictment *quod fregit clauſum ad ipſum interficiendum*, no Felony, for no Manſion houſe.

A. leaſes to *B.* a ſhop, parcel of his houſe, to work in, where *B.* works in the day, which is broken, ruled not Burglary, becauſe ſevered *per* Leaſe. *Trin.* 17 *Jac.*

IV. With *Intent* to commit ſome Felony.

If the houſe be broken and entred with an intent to commit a Treſpaſs, as to beat the owner, no Felony. C. PC. c. 14.

If with intent to commit a Rape, by ſome no Burglary, becauſe no Felony at Common Law; but this ſeems otherwiſe, though the Felony be not done.

The Indictment runs, *Burglariter*

& felonice domum &c. fregerunt vel intraverunt ad ipſum &c. interficiendum.

And by the Stat. of 18 *El. c.* 6. Clergy taken away in all Burglary.

Arſon.

Arſon.

Burning is Felony at Common Law by any that ſhall maliciouſly and voluntarily burn the houſe of another.

Burning.

Setting fire to a houſe, without burning it, or any part of it, no Felony; but if part of the houſe be burnt thereby, it is Felony by Common Law.

Maliciouſly.

A. intending to burn only the houſe of *B.* thereby burns the houſe of *C.* this is Felony; and he may be Indicted, That *ex malitia præcogit'* he burnt the houſe of *C.*

A. maliciouſly burns his own houſe, to the intent to burn others, but none elſe but his own burnt, ruled no Felony, but a great miſdemeanor; upon which ſet in the Pillory, and bound perpetually to good behaviour. 9 *Car. B. R. Haines's* Caſe.

Mes si le meason d'autre pt c̄ est combure, est Felony.

The *House*.

In-set house, or Out-set house.

If parcel of the Mansion house, as Stable, Mill-house, Sheep-house, Barn, and no Clergy.

§. But burning of a Barn, not parcel of a Mansion house, if it hath Corn or Hay in it, Felony, otherwise not.

But Felon not oust of Clergy, unless part of a Mansion house or Barn with Corn.

Burning the frame of an house by 37 *H.* 8. attempting to burn a stack of Corn by 3 & 4 *E.* 6. made Felony, but both Repealed 1 *Ma.*

But in *Northumberland*, *Cumberland*, *Westmorland*, and *Durham*, Felony to burn a stack of Corn by 43 *El. c.* 3.

Nota, The Indictment of Burglary *Domum Mansionalem*; of Arson only *Domum*.

Breach

Breach of Priſon.

NOW we come to thoſe Felonies that are the *hindrance of ameſting a Felon to publick Juſtice*; And they are of three kinds in reference to the perſon that cauſeth it:

1. In the party himſelf:
   - Breach of Priſon.
   - Eſcape.

2. In the Officer or perſon that permits it;
   - Voluntary,
   - Involuntary: and then

3. In a Stranger, that is Reſcue.

1. *Breach of Priſon.*

At Common Law it ſeems all breach of Priſon Felony; but by Stat. 1 *E.* 2. *nullus de cætero, qui priſonam fregerit, ſubeat Judicium vitæ vel membrorum pro fractione priſonæ, niſi cauſa, pro qua capt' & impriſonat' fuerit, fuit, tale Judicium requirit.*

And herein these things are considerable:

1. Who may *Arrest* or Imprison?
2. What a *Prison?*
3. What *breaking* a Prison?
4. What a *cause* that requires a Judgment to make this Felony?

Arrest.

Arrest.

1. WHo may Arrest or Imprison? This is either
   1. By a private person.
   2. By a publick Officer.
   1. Arrest *by a private person*, and that two kinds:
      1. Either commanded and enjoyned by Law.
      2. Or permitted and allowed by Law.

Arrest *commanded* by Law: C. P. C. 53.

1. Persons present at the committing of a Felony must use their endeavours to apprehend the Offender, otherwise they are to be fined and imprisoned.

Hence it is that if a Murder be committed in the day in a Town not inclosed, the Township shall be amerced; if in a walled Town, be it night or day, the Town shall be amerced [if Offender escape.] Stat. 3 *H.* 7. 1. St. P. C. 29.

So

So it ſeems if one ſtrike another dangerouſly, though death hath not yet hapned.

C. P. C. 52. 2. Upon *Hue-and-Cry* well levied, every man may and muſt arreſt the Offender upon whom it is levied, by Stat. *Wincheſter:* and want of purſuit thereof is puniſhable by Fine and Impriſonment.

The *manner of levying Hue-and-Cry* is, where a Felony is committed, or a dangerous ſtroke given, reſort to the Conſtable, declare the Fact, deſcribe the Party and the way he is gone, who thereupon is to raiſe the Town, be it by night or day, and to give the next Conſtable warning, and he the next.

3. In aid of an Officer that hath a lawful warrant *in fact*, or in Law, to arreſt a Malefactor.

And in theſe caſes it ſeems it is in the power of ſuch private perſon to break the houſe, if upon demand he cannot be admitted to take the Offender. 7 E. 3. 16.

Dal. f. 249.

V. Cooke Jur. Courts 177. *Videtur*, 1. *Sur felony fait & juſt ſuſpicion aſcun poit arreſter.* 2 E. 4. 8.

2. *Sur*

2. *Sur Arreſt di' ameſner al Common Gaol*, 20 E. 4. 6. *ou deliver al Conſtable*, 10 E. 4. 17.

2. A *permiſſive* Arreſt by a private perſon:

If a Felony in fact be committed, and a private perſon ſuſpect another upon probable cauſe, he may be arreſted, though in truth innocent: And theſe may be *probable cauſes*;

Hue-and-Cry levied;

§. Company with the Offenders.

§. Goods in his Cuſtody;

§. Living vagrantly;

§. Common Fame.

But upon ſuch ſuſpicion he cannot break open the door of a houſe, but may enter the door being open. *C. Jur. Corris* 179.

The perſon arreſted by either of theſe means by a private perſon muſt be brought to the Conſtable; and if Conſtable be not to be found to a Juſtice; and in caſe of a Felony known, put in the Stocks or Common Goal till he be brought to a Conſtable. Dal. fo. 414.

2. Arreſt

2. Arrest *by a publick Officer* without Process of Law.

Nota, Whatsoever a private person may do in this case, an Officer as a private person may do.

Now these *Officers*,

1. *Constable.*

If complaint be made to a Constable of Felony committed, or of a dangerous blow given, though the party not dead; or in case there be an assault upon the Constable, or in case of any other breach of the Peace, the Constable may imprison the party in the Stocks, in the Goal, or in his House, till he can bring him before a Justice of Peace.

But if it be a bare breach of the Peace, unless it be in his view, he cannot arrest the party; but complaint must be made to a Justice of Peace, for the Constable is but a Conservator, not Justice of Peace, unless a Felony be done.

If a Constable see an Affray, and the Malefactors fly into another County before arrest, he may pursue

ſue them and arreſt them there, and then he muſt bring them before a Juſtice of that County where arreſted.

But if the Eſcape was after arreſt, then he may retake them in another County, and bring them to the firſt.

He may break open doors to take an Offender, where Felony committed, or a dangerous wound given. Dalt. 78.

2. By a Juſtice of Peace, who upon complaint may iſſue out his Warrant to apprehend the party:

1. A general Warrant to ſearch for Felons or ſtoln Goods, not good. C. Jur. Courts, 177.

2. If a Juſtice hath cauſe of ſuſpicion, he may arreſt as a common perſon, not as a Juſtice.

3. Upon complaint of a Felony committed, and where doubt may be of apprehending the Offender, in aſſiſtance of the party ſuſpecting, he may grant his Warrant to the Conſtable to apprehend the party, but the party ſuſpecting ought

ought to be preſent, becauſe it is his arreſt.

But by vertue of ſuch Warrant doors cannot be broken up.

4. But at the Seſſions the Juſtices may award a *Capias* againſt the perſon indicted, and by vertue thereof the Sheriff may break open doors.

A party being apprehended by ſuch Warrant, is either to be Committed, Bailed, or Diſcharged.

The *Commitment* by a Juſtice ought to be to the Common Goal by the Stat. 23 *H.* 8. *c.* 2. and the *Mittimus* ought to be,

1 *M. Car.* Stat. 1 *E.* 2.

1. Under Seal.

2. Contain the Cauſe.

3. Have an apt Concluſion, *viz.* there to ſtay till delivered by Law, otherwiſe the Warrant void.

2 C. PC. c. 100. fo. 209.

And note, That a perſon committed for Treaſon, Felony, or other crime, cannot be *diſcharged* till

till indicted and acquitted, or *Ignoramus* found, or discharged by Proclamation, or by the Kings Bench upon *Habeas Corpus*.

Bail.

Bail.

IN order to the consideration of Arrests and Escapes, here fit to consider of Bail and Mainprise in cases of Felony.

1. What Bail is?
2. In what cases?
3. By whom?

1. *Bail* are Sureties taken by a person authorized, to appear at a day, and to answer and be justified by the Law.

The difference between Bail and *Mainprise* is, That Mainpernors are only Surety; but Bail is a Custody; and therefore the Bail may reseize the Prisoner if they doubt he will fly; and detain him and bring him before a Justice; and the Justice ought to commit the Prisoner in discharge of the Bail; or put him to find new Sureties: The like may be done by the Justices in case of insufficient Bail.

If

If a Justice of Peace take insufficient Bail, and the party appear not, the Justice finable by Justice of Goal Delivery.

The *sufficiency* of the Bail in respect of their number, two at least; and those Subsidy men in case of Felony.

And in respect of the sum, forty pounds at least.

Bail is either in a certain sum; or *corpus pro corpore*, in which case the Offender not appearing, the Surety shall not be Executed, but only Fined. 29 *Assis.* 44.

2. *In what Cases?*

1. *Generally*; To refuse Bail where the party ought to be bailed, the party offering the same, is finable as a Misdemeanour;

§. And admitting Bail when it ought not is punishable by the Justice of Goal Delivery by Fine, or punishable as a negligent Escape at Common Law, *de quo infra.*

2. *Particularly*; At Common Law Bail in all Cases but Homicide; But now the Stat. *Westm.* 1. c. 15.

directs in what Cases bailable, and what not?

At this day in all Offences below Felony, the party accused is bailable, unless

1. Ousted by that Statute, or some other Statute.

2. Unless Judgment be given.

Crom. 154. If a person be brought before a Justice, if it appears no Felony be committed, he may discharge him; but if a Felony be committed, though it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him.

The cases of Felony wherein the parties are not bailable, are

1. In *respect of the hainousness* of the Offence.

1. In a Charge of Treason against the King's Person;

§. Counterfeiting the Seal;

Dal. c. 114. §. Falsifying Money.

2. Arson, or burning Houses.

3. In a Charge of Homicide.

1. In case of a Charge of Murder Justices of Peace cannot bail but the

the King's Bench may; but do not in diſcretion, for the Stat. *Weſt.* 1. extends not to that Court. Dal. c. 114. V. C. *ſuper Stat.*

2. In caſe of Manſlaughter, though it be but *ſe defendendo*, and ſo appear to the Juſtices of Peace, they cannot bail the party accuſed:

1. If he confeſs the Fact upon examination; Dal. c. 114.

2. If taken with the manner, if apparently known or manifeſted that he killed another.

But if it be a *non liquet* that he the perſon, and the Charge but Manſlaughter, there it ſeems they may bail.

So if he have given a dangerous ſtroke, he may be bailed till the party dead.

But ſuch bailment where Manſlaughter or other Felony is committed, muſt be

1. By two Juſtices, one of the *Quorum*.

2. After Examination, &c. 3 H. 7. c. 9.

And theſe be all the perſons excluded from bail ſimply, in reſpect of the nature of the offence: Hence St. 1 & 2 Ph. & Ma. c. 13.

C. Weſt. 1. c. 15. 1. All Acceſſaries before or after any Offence bailable; but if the Principal be attainted, and Acceſſary indicted, he ſhall not be bailed

St. PC. c. 18. until he hath pleaded to the Indictment.

2. Perſons indicted of Larceny before the Sheriff, if of good name.

3. Impriſonment for a light ſuſpicion, if of good name.

4. Indicted or accuſed of petty Larceny only.

5. Appellee of Approver after death of Approver.

6. Accuſed for Treſpaſs, for which a man ought not to loſe life or member, if bail not taken away by a ſubſequent Stat.

Dal. c. 114. f. 304. And hence alſo a party indicted for Burglary or Robbery may be bailed.

2. As bail is ouſted in ſome caſes, in reſpect of the greatneſs and conſequence of the Offence charged, ſo it is in *reſpect of the Notoriety* of the Offence: For bail is, when *Stat. indifferenter*, whether the party be guilty or no: But when that indifferency

ference is removed, the Offender otherwise bailable is become not bailable.

1. If a Person be Attaint by Utlary of any Felony, yet if the Defendant comes in and pleads in avoidance of the Utlary, be it in Appeal or Indictment, the King's Bench may bail him. West. 1. c. 15.

2. If he be convict by Verdict or Confession of any Felony, he is not bailable. Dal. c. 114.

But if a man be convict of Manslaughter *se defendendo*, the Justices of *B. R.* or Goal Delivery, or special Writ may bail him, but not Justices of Peace: So if he have a Charter of Pardon. Dal. fo. 383.

3. He that becomes an Approver cannot be bailed.

4. He that Abjures cannot be bailed.

5. He that's taken with the manner not bailable; And consequently neither he that's taken freshly upon Hue-and-Cry. *Bridges*'s Case. Justice of Peace fined 40 *l.* for bailing such.

6. He that breaks Prison not bailable.

7. Open and notorious Thieves not bailable.

But he that is taken for a light ſuſpicion bailable.

But if the Preſumption be ſtrong, or the Defamation great, the Juſtices may refuſe to bail him: This lies in diſcretion.

8. Thoſe that are appealed by Provers, unleſs

1. The prover die.

2. The prover wave his Appeal.

3. Unleſs he be of good name.

And the reaſon hereof, becauſe when the Approver appeals another, he confeſſeth himſelf guilty, and therefore induceth a preſumption of guilt in another.

But this concerns not Juſtices of Peace, becauſe no man can become Approver before them, becauſe they cannot aſſign a Coroner; but they may take the Confeſſion by way of Evidence.

But

But a bare Indictment or Appeal did not induce such a presumption that may hinder the bailing of a Person otherwise bailable. 4. Stat. Westm. 1. cap. 15.

But in Appeals of Death the Court in discretion admit not the Defendant to bail but upon weighty cause. St. PC. 18.

If the party be acquitted within the year upon Indictment, he is not to be discharged, but remanded or bailed at discretion, that an Appeal may be prosecuted against him, 3 H. 7. Ca. 1.

2. *Who may take* bail, or bail Offenders?

Bail was taken either *virtute brevis*, or *ex officio*.

1. Bail taken *virtute brevis*, that is either General or Special.

The general Writs.

Plevine replegiandis.

Habeas Corpus in the Kings Bench.

Writ of Mainprise; this was directed to the Sheriff commanding him to deliver by the Mainprize of

twelve the party indicted before him.

But now by Stat. 28 E. 3. c. 9. these Inquests before Sheriff are taken away, and consequently the Writ of Mainprize.

St. PC. 77.

Special Writ, as where a party is convict of Manslaughter *se defendendo*; a Special Writ to certifie.

2. Bail *ex officio*.

1. The *King's Bench*, who have a higher Power than any other Power.

1. They may either in case of an Original Suit, by Indictment or Appeal before them; or upon an Indictment or Commitment returned to them, by *Habeas Corpus* or *Certiorari*, bail where another Court cannot:

In case of Murder. *B.* Mainprise, *Co.* 63. &c.

In the cases prohibited by Stat. *West.* 1. *c.* 15. V. *Cook ibid. verb. viscounts, & autres verb ne soient replevisable.*

2. *Justices of Gaol Delivery*, who may bail in cases where Justices of Peace

Peace cannot, if it be of a thing within their cognizance.

§. As a person convict of Manslaughter *se defendendo*;

§. Or a person convict of Manslaughter that hath a Pardon to plead.

3. Justices of Peace.

1. They cannot bail in any case, but where they have cognizance of the cause; therefore if taken upon Process of Rebellion out of *Chancery* they cannot bail.

2. The Statutes that give power to Justices of Peace to bail in case of Felony, are 3 *H.* 7. c. 3. 1 & 2 *Ph. & Ma.* c. 13. upon which two kinds of bailments.

1. Upon the first Accusation, and before Examination, and that doubtless must be done.

1. By two Justices, whereof one of *Quorum*.

2. After Examination taken concerning the Offence. Cr. 154.

3. After commitment: And though some Opinion be that he may be bailed by one Justice, yet it seems

seems otherwise, for the Stat. of 1 *R.* 3. that gave power to one, stands repealed by 3 *H.* 7.

3. After Indictment and Process thereupon issued in case of Trespass or Misdemeanor, on Penal Statute, not prohibiting bail, he may be bailed by two Justices, whereof one of the *Quorum*; and by one by one Justice, and thereupon may grant a *Supersed.* to the *Exigent*. But it seems this holds not upon a Process upon Indictment of Felony.

The Sheriff, Baily, or Officers which was of Indictment before them: But these are removed from that power, as it seems by the Stat. 28 *E.* 3. *c.* 9. 1 *E.* 2. *c.* 3. whereby they are not to make Process, but to remove them to the Sessions of the Peace.

1. By two Justices, whereof one of the *Quorum*.

2. After Examination taken concerning the Offence.

3. After commitment: And though some Opinion be that he may be bailed by one Justice, yet it seems

Rumper

Rescuers Prison.

NOw having considered the persons that may arrest and bail; it makes way to consider the Offence against such Arrest or Imprisonment, by breaking such Prison, &c. And herein ensues the second Consideration.

2. What a *Prison* within this Statute?

1. The Stocks.
2. The Prison of a Lord of a Franchise.
3. The Custody of any that lawfully arrests, or the house of the Constable, or other person where detained.
4. The Church, where a person abjuring is
5. The Prison of the Ordinary, which is now ousted, Stat. 29 *H.* 8. *cap.*

3. What

3. What a *breaking*?

If the Priſon be fired without the privity of the Priſoner, he may lawfully break it to ſave himſelf.

2. If Goaler do voluntarily permit him to eſcape, Felony in the Goaler, not in the Priſoner; but if negligent, Felony in the Priſoner, and Miſdemeanor in the Goaler.

3. If Priſoner under Cuſtody be reſcued, or Priſon broke by ſtrangers without his procurement, no Felony in the Priſoner.

4. Going out the doors open, no Felony; for the Statute requires an actual breaking.

4. *Niſi cauſa; tale judicium*, &c.

1. If *A.* mortally wound *B.* and is committed, and he break Priſon, and *B.* then die, no Felony.

2. If a Felony made by a ſubſequent Statute, and an Offender committed therefore, break Priſon, Felony.

3. Com-

3. Committed for ſuſpicion of Felony, yet if a Felony done, breaking Priſon Felony.

4. If the Offence for which the party was committed appear not by matter of Record, neceſſary a Felony be done, elſe breach of Priſon no Felony.

But if it appear by matter of Record, and the party taken by *Capias*, if he break Priſon, Felony, though no Felony done.

5. If Felony was done, yet breach of Priſon no Felony, unleſs a lawful *Mittimus*, *de quo ſupra*.

6. The Indictment for the breach muſt be Special, that it may appear he was committed for Felony.

5. *Tale Judicium requirit.*

1. Breach of Priſon turns into Felony only, though the party were committed for Treaſon.

But if a Priſoner break a Priſon wherein Traitors are, to let out the Traitors, this is Treaſon.

2. A

A man imprisoned for Petit Larceny, or *Se defendendo*, breaks Prison, no Felony.

If a Prisoner break Prison he may be Arreigned of that before he be convict of the first Felony.

But a Goaler permitting a voluntary Escape shall not be Arreigned till the Prisoner be first attaint; for if the Prisoner be acquit, the Escape dispunishable.

V. Dal. 331.

Escape in the Party.

NOta, If a person escapes before arrest, not punishable in him as Felony, but for the Flight he forfeits Goods when presented.

In case a man slain in the day, if the Offender Escape, Township amerced. *Vide supra.*

Issint si soit dangerousment wound, 3 H. 7. c. 1. *Et si soit vill immune ser. amerce, soit veo in jour on unit.* 3 E. 3. Coron. 299. Stat. Winton cap. 4.

Escape

Escape in the Officer, or him that makes Arrest.

THis is either in case of Arrest
1. By a Stranger.
2. By an Officer.

If *a stranger* arrest a man for Felony, or suspicion thereof, and deliver him over to four others, and they receive him and let him go at large, this an Escape in both; for the first man should have delivered him to the Constable; and the latter should not have let him go at large.

And the same Law seems to be for an escape by a stranger that hath a Prisoner in his Custody, as for an Officer in case of Escape voluntary or negligent.

Escape by an Officer.

ESCape of an Officer.

1. *Negligent.*

1. Bailing a person not bailable, through ignorance, by one that hath power to bail, a negligent Escape.

But it seems if done by a Goaler a voluntary Escape; because he hath no such power.

2. The ordinary punishment of a negligent Escape.

1. Of a party attaint 100 *l.*

2. Of a party indict 5 *l.*

3. Of a party not indict at discretion.

3. For insufficiency of the Goaler, the Sheriff must answer for negligent Escapes.

4. A Goaler *de facto*, though not *de jure*, muſt anſwer for Eſcapes.

5. If after a negligent Eſcape the Goaler retake him upon freſh Suit before he be puniſhed, it excuſeth.

If the Conſtable bring a perſon to Goal, the Goaler refuſeth him, the Vil ſhall be charged, and Goaler fined.

2. *Voluntary* Eſcape.

St. 14 E. 3. c. 10.

1. Hath the ſame Crime that the perſon permitted to Eſcape ſtood committed for, *viz.* Treaſon or Felony.

2. But this is in the immediate perſon that permits it; and therefore though civilly the Sheriff muſt anſwer for offences of Goaler, yet not criminally.

3. There muſt be a Felony really done, and a Commitment by a lawful Warrant.

4. If within the year the Priſoner be acquitted upon Indictment, yet a voluntary Eſcape is puniſhable as Felo-

Felony, because wife intitled to her Appeal.

5. The Escape if voluntary punishable *ut supra*, though the Prisoner were not indicted, Dal. fol. 336. Dy. 99.

Reſcue.

1. A Hinderance of a perſon to be arreſted that has committed Felony is a Miſdemeanor, but no Felony.

2. But if the party be arreſted, and then reſcued, if the arreſt was for Felony, the Reſcuer is a Felon; if for Treaſon, a Traitor; becauſe they are all Principals.

But he ſhall not be arreigned till the Principal attainted; and if the Principal die before attainder, the Reſcuer ſhall be fined and impriſoned.

3. There muſt be a Felony really done, and a lawful Commitment.

N. *Reſcue hors de cuſtody de Conſtable, &c. eſt Felony, licet ne fait ameſne al Gaol.*

Felonies

Felonies by the Statute.

C. Pl. C. c. 41

3 H. 7. *cap.* 14.

Imagining and *conſpiring* to kill the King, or any of his Council.

§. Clergy not taken away.

1 *Jac. c.* 12.

§. *Witchcraft, de quo ſupra.*

§. 25 *H.* 8. *c.* 6. revived by 5 *El. c.* 17.

Buggery with Man or Beaſt.

§. Without benefit of Clergy.

Debet eſſe Penetratio as well as *Emiſſio.*

13 *E.* 1. *c.* 34.

In this and Rape *carnaliter cognovit.*

Rape: This was Felony at Common Law; then by Stat. *Weſtm.* 1. *c.* 13. made but a Miſdemeanor; then by this Statute reſtored to Felony again.

And hence it is that it is not inquirable in a Leet, becauſe though now Felony, yet it loſt its nature by *W.* 1. *c.* 13. C. ſur cet Stat.

Nul Appeal done al party.

33 E. 3. Corone 169.

If the woman be under ten years, then though she consent, yet by Stat. 18 *El. c.* 6. it is a Rape; if above ten years, if she consent not, a Rape, though she consent after.

But in such case of a subsequent consent, the Stat. 6 *R.* 2. *c.* 6. gives the Appeal to the Husband, if none to the Father, &c.

Clergy taken away by Stat. 18 *El. c.* 7. upon Conviction by verdict, or Confession, or utlawed.

Cestuy que ayd in Rape est Ravisor. 11 H. 4. 13.

3 *H.* 7. *c.* 2.

Taking a woman against her will and marrying her, Felony.

1. Such Maid, Widow, or Wife must have Lands, Tenements, or Goods, or be Heir Apparent.

2. She must be taken against her will.

3. She must be married or defiled.

4. Extends not to taking a Ward or Bondwoman.

Nota,

Nota. The taking away in one County, and marrying in another, Indicted where married; and they may enquire of the forcible taking. 2. Privy to the marriage, but not to the force, not Guilty. 3. Marriage with consent not excusing so long as she is under the force, 13 *Car. Fulwood's* Case.

All Accessaries before or after made Principals by this Act.

Clergy taken away by Stat. 39 *El. c.* 2.

5 *H.* 4. *c.* 5.

Malicious cutting out Tongue or putting out Eyes, Felony.

Clergy not taken away.

Extends not to cutting off Ears.

8 *H.* 6. *c.* 12.

Stealing, carrying away or avoiding Records, Felony. And

The Judges of either Bench enabled to hear and determine the same.

Accessaries before made Principals.

§. Clergy allowable.

5 *H.* 4. *c.* 4.

Multiplication of Gold or Silver, Felony.

1 *H.* 7. *c.* 1.

Hunting unlawfully in Forests, Chases, or Warrens with painted faces by night, and rescuers, &c. other then the party arrested, Felony.

31 *El. c.* 4.

Imbezelling the King's Armour, &c. Felony.

Qualifications.

1. Ought to be impeached within a year.
2. Offender loseth Lands but during life.
3. No Corruption of blood.
4. Wife loseth not Dower.
5. Defendant admitted to proof.

3 *Jac. c.* 4.

Subjects passing Sea to serve forreign Prince, not having taken Oath of Obedience:

No Corruption of blood:

Offender may have Clergy.

Articuli

Articuli super Cartas c. 2.

Purveyors Felons in certain cases;

§. They may have Clergy.

39 *El. c.* 17.

Wandring Souldiers Felons in certain cases.

§. Excluded of Clergy.

18 *H. 6. c.* 19.

Souldiers retained, as is prescribed in the Act, departing from their Captains without license.

§. 2 *E. 6. c.* 2. *ad idem.*

§. Clergy excluded.

1 *Jac.* 12.

Marrying a second husband or wife, the former living, Felony: except cases following:

1. The man under fourteen, or the wife under twelve at time of first marriage, and not agreeing after first Espousals, may marry a second husband or wife.

2. A man or wife absent above seven years, second marriage no Felony: If beyond Sea, though notice of

1 Jac. 11. of life; If in *England*, then without notice.

3. After a Divorce, though *à mensâ & thoro* only.

4. After a nullity declared of the former marriage by Ecclesiastical Court,

Offenders have Clergy.

1 *Jac. c.* 31.

§. For going with a Plague sore, but this discontinued.

Gaoler compelling Prisoner, by Duress to become Appellor, Felony, whether the Appellees be acquitted or not.

3 *H.* 5. *c.* 1.

Coining, or bringing in Gally half pence, Sukitts, or Dodkins.

§. And 2 *H.* 6. c. 9. payment of blanks.

Offender hath Clergy.

1 *E.* 3. *c.* 15.

Transportation of Silver, or Importation of false money made Felony.

Offender hath Clergy.

18 *H.* 6. *c.* 15.

Expor-

Exportation of Wooll or Woollfells, other than to the Staple of *Calais*.

37 *E.* 3. 19.

Stealing Falcons, &c. or concealing the same after Proclamation, Felony,

Offender hath Clergy.

3 *H.* 6. c. 1.

Congregation of Masons to prevent Statutes of Labourers;

§. But this Obsolete by the Statute 5 *El.* the Acts to which it relates are repealed.

27 *El.* c. 2.

Receiving, retaining, or maintaining a Jesuit or Popish Priest knowingly,

Clergy excluded.

35 *El.* c. 1.

Felony refusing to make Abjuration, or after Abjuration not to depart, in some case

Clergy excluded.

1 & 2 *Ph.* & *M.* c. 4.

Egyptians above fourteen years remaining here a month.

§. And 5 *El.* c. 20. takes away Clergy.

39 *El.*

39 El. c. 4. 1 Jac. c. 7. 25.

Dangerous Rogue adjudged to the Gallies; and returning without licenſe, Felony:

4. But Offender hath Clergy:

5. But branded Rogue Felon, and no Clergy.

5 El. c. 14.

Forging a Deed after a former Conviction.

C. PC. f. 172. If a man be convict or condemned of publiſhing a forged Deed, and after he forge a Deed, this is Felony.

If the offence were after a former, but before conviction thereof, no Felony.

Clergy ouſted.

8 El. c. 3.

Sending ſheep beyond Sea after a former conviction,

Clergy allowed.

33 H. 6. c. 1.

Servants after deceaſe of their Maſter, riotouſly ſpoiling Goods, &c.

Offenders ſhall have Clergy.

21 H.

21 *H.* 8. 7.

Servants imbezelling Goods of their Masters delivered to them, Felony.

But the Statute of 27 *H.* 8. *c.* 27. that took away Clergy being Repealed by 1 *E.* 6. *c.* 12. they may now have Clergy.

22 *H.* 8. *c.* 11. 2 & 3 *Ph.* & *Ma. c.* 19.

Cutting Powdike, Felony,
Offender hath Clergy.

43 *El. c.* 13.

Detaining persons in *Cumberland*, &c. against their will, and giving or receiving blackmail, &c. Felony,
Without Clergy.

Misprī-

Misprisions.

NOW we come to Offences Criminal, but *not Capital*; and those of two kinds:

1. Offences by Common Law:
2. Offences against special Statutes.

Offences by *Common Law* not Capital, are either greater Offences or lesser:

Greater; and those come under name of *Misprisions*, which again are of two sorts:

Negative, in not doing that they ought, or of Omission.

Positive, in doing some great Misdemeanor they ought not.

Misprision

Miſpriſion of Treaſon.

The Negative *Miſpriſions.*

1. *Miſpriſion of Treaſon.*

All Treaſon includes Miſpriſion: The Concealing of any Treaſon, is declared Miſpriſion only by the Statute of 1, 2 *Mar. c.* 10. *que indure anxi miſpriſion.* 2 R. 3. 9. C. PC. c. 3.

But this in caſe of bare knowledge; for if knowledge and Aſſent it is Treaſon: and though the Treaſon be by Statute, yet the concealing thereof is Miſpriſion of Treaſon.

Every man therefore that knoweth a Treaſon, muſt with all ſpeed reveal it to the King, his Privy Council, or other Magiſtrate.

He that receives and comforts a Traitor knowingly, be it a counterfeiter of Coin or other, is a Principal Traitor, and not only guilty of Miſpriſion. *Abingdon*'s Caſe againſt the Opinion in *Dyer* 296. *Conier*'s Caſe. C. PC. c. 64.

The

The *Judgment* in case of Misprision of Treason is Imprisonment during life, forfeiture of Goods, forfeiture of profits of Land during life.

Nota *si un comist un que ad counterfeit Coigne, & ne lui discover, est Misprison de Treason. Mes si un solment utter counterfeit coigne sciant ceo estre counterfeit nest Misprision de Treason, mes sur Fine & Imprison, Issint resolve a Newgate.* 1661.

Miſpriſion of Felony.

2. MIſpriſion *of Felony* is either by Common Law, or by Statute.

By the Common Law a concealment of a Felony, or procuring of the concealing thereof.

The Puniſhment.

1. If a common Perſon Fine and Impriſonment.

2. If an Officer, as Sheriff, Coroner, Impriſonment for a year, and Ranſome at the King's pleaſure by Stat. *W.* 1. *c.* 9.

By the Stat. 3 *H.* 7. *c.* 1. 33 *H.* 8. *c.* 8. one knowing of an unlawful Aſſembly, and not diſcovering it within 24 hours.

Concealment of Jurors, *v. Stat.*

Theft-bote.

3. *Theft-bote*, which is more than a bare Miſpriſion of Felony, and is where the Owner doth not know the Felony, but takes his Goods again, or other Amends, not to Proſecute.

But taking the Goods again barely no offence, unleſs he favour the Thief.

The puniſhment hereof is Ranſome and Imprisonment.

Miſpriſions Poſitive, or of Commiſſion.

1. DIſcovery by one of the grand Inqueſt of the perſons Indicted, or Evidence againſt them, Miſpriſion, puniſhable by Fine and Impriſonment but no Felony, nor Treaſon. C. PC. c. 46.

2. A perſon diſſwading Witneſſes from bringing in Evidence againſt a Felon is no Acceſſary, but a great Miſpriſion, puniſhable by Fine and Impriſonment. C. PC. c. 64.

3. Reproaching a Judge, aſſaulting an Attorney againſt him or abuſing a Juror that gave verdict againſt him; a great Miſpriſion, puniſhable by Fine and Impriſonment.

4. Reſcuing a Priſoner from the Bar of the Courts of *B. R. Canc. B. C.* or *Exchequer*, a Miſpriſion for which the party ſhall loſe his Hand, Goods, Profits of Lands, during Life, and perpetual Impriſonment.

5. If a man ſtrike ſitting the four Courts at *Weſtminſter*, in the preſence

ſence of the Court, the like Judgment.

6. If in preſence of thoſe Courts, or before Juſtices of Aſſize or *Oyer & Terminer*, a perſon draw his Sword upon any Judge or Juſtice, though he ſtrikes not, or ſtrike another, like Judgment.

7. By *Stat.* 33 *H.* 8. *c.* 12. ſtriking in the King's preſence, drawing blood; loſs of hand and perpetual Impriſonment, Fine and Ranſom.

8. By *Stat.* 14 *El. c.* 3. forging of Money not currant Miſpriſion of Treaſon.

9. Stranger uttering falſe Money made within this Realm, knowing it Counterfeit, 3 *H.* 7. 10.

10. A Lord of Parliament departing from Parliament, 3 *E.* 3.

Maihim.

Maihim.

AND hither we may refer *Maihim*, which though it be a particular Crime, for which Appeal lieth, yet it is not Felony of death.

Cutting off the hand, or striking out a tooth, Maihim, but not cutting off the ear. C. P. C. c. 40.

The Judgment is only Fine and Damages; and therefore if recovery in Trespass, it is a good barr in Appeal of Maihim.

Offences not Capital.

OFfences of an Inferior nature: they are either such as are committed by an Officer,

Neglect of Duty,
Bribery,
Extortion.

Or such as refer to a common person, without relation to Office, and those reducible to three kinds;

1. Breaches of publick Peace, and therein
   1. Of Affrays.
   2. Of Riots.
   3. Of Forcible Entries.
   4. Barretries.
   5. Riding armed.
2. Deceipts and Cozenage,
3. Nusances.

Decay of Bridges.
Decay of High-ways.
Inns and Alehouses.

Breach

Breach of the Peace.

AFFRAY,

If weapons drawn, or ſtroke given or offered; but words no Affray; menace to kill or beat, no Affray; but yet for ſafeguard of Peace, Conſtable may bring them before Juſtice.

In Affrays conſiderable,

1. What a *private man* may do?

Private perſons may ſtay Affrayers till heat over, and deliver them to Conſtable.

If perſon hurt another dangerouſly, private perſon may arreſt the Offender, and bring him to Goal or next Juſtice. Dal. c. 8.

2. What by a *Conſtable*.

1. Affray in preſence of a Conſtable, he ought to do his endeavour to ſuppreſs it, otherwiſe finable.
2. If an Affrayer fly to a houſe, or if made in a houſe, Con-

ſtable may break open houſe to preſerve peace, or take the Offender.

3. If in Affray aſſault be made upon the Conſtable, he may ſtrike again, or impriſon Offender.

4. Conſtable may in ſuch caſe impriſon till he find ſurety of Peace.

5. But it ſeems if Affray paſt, and not in view of Conſtable, he cannot impriſon without warrant of the Juſtice unleſs Felony done, or like to be done.

3. What by a *Juſtice?*

1. In his preſence, the ſame power that a private perſon or Conſtable, and may impriſon till ſurety of Peace found; the like upon Complaint.

2. If dangerous hurt, Juſtice may impriſon till appear whether the party die or live, or bail the party.

The former better diſcretion.

Riot.

Riot.

Where above the number of two meet to do some unlawful act, and do act it; but if they meet and act it not, an unlawful Assembly, in power of Justices to suppress them, 13 *H.* 4. f. 7.

A man for safeguard of his house against Malefactors or Trespassers, may assemble his Friends for his Defence.

But he cannot assemble to prevent a beating threatned in his presence.

Riot recorded by one Justice upon view traversable; by two not, because pursuant to the Statute.

Forcible

Forcible Entry.

Forcible Entry must be either
Manu forti,
Furnished with unusual weapons,
Menace of life or limb.
Breaking open door:
Contra, it seems if door only latched,
Ejecting forcibly the possessors.
Cum multitudine gentium, one may commit a Force, three at least a Riot.

Forcible

Forcible Detainer.

Menacing the Poſſeſſor to go out upon pain of loſs of life or limb.

Unuſual Weapons or Company.

6. Refuſing to admit the Juſtice to come in to view the Force.

Detainer with Force juſtifiable where party in poſſeſſion three years;

6. But though his Poſſeſſion lawful, yet if within the three years actually removed, though reſtored by the Juſtices, enables not a Detainer with Force.

But if the three years Poſſeſſion hath been by Force, then the laſt forcible Detainer punihable, and hinders not Reſtitution.

If a Diſſeiſee within the three years make lawful Claim, this an interruption of his Poſſeſſion.

Reſtitution.

Restitution.

1. *By whom?*

1. Justices *B. R.* may restore upon Indictment removed before them.

2. One Justice of Peace cannot restore upon an Indictment before them; nor Sessions of Peace, unless upon Indictment found at Sessions.

3. It seems Justice of Goal Delivery or Oyer and Terminer cannot Restore.

2. *How?*

Upon view.

Upon Indictment.

Must be sufficient.

Adhuc extra Lenet.

If Erroneous, may be superseded by the same Justice before Executed: After it is Executed.

The Re-restitution in *B. R.* upon Indictment quashed.

Resti-

Reſtitution *ſtayed.*
By Certiorari.
By quaſhing Indictment.
By pleading thereunto, which is nevertheleſs in diſcretion.

Barretry.

Barretry.

Riding Armed.

Going Armed.

V. *Stat.* 20 *R.* 2. *c.* 1. 7 *R.* 2. *c.* 13. 2 *E.* 2. *c.* 3. *Stat. Northampton.*

Nusances.

Nusances.

BRidges Publick

Are not chargeable upon a particular person, but *ratione tenuræ.*

But of Common Right repairable by the whole County.

The manner of Repairing directed by Stat. 22 *H.* 8. *c.* 5.

High-

Highways.

HIghways: Provisions,

1. For their *Enlarging* and removing Trees within 200 foot of either side.

13 *E.* 1. *c.* 7.

5 *El. c.* 15.

2. For their Amending *vide* the Stat.

5 *El. c.* 13.

29 *El. c.* 5.

2 & 3 *P. M. c.* 8.

The *Charge* of repair of Highways lies of common right upon that Parish wherein they are, unless

1. A Special Prescription cast it upon another.

2. Unless the Owner of the Land, in which they are, inclose it, then it must be cast upon the Owner.

But they that have Ditches on either side ought to scoure them, 8 *H.* 7. 5.

Inns,

Inns.
Ale-houſes.
Bawdy-houſes.
Gaming-houſes.

Common Inns.

1. ANY perſon may erect a Common Inn, ſo it be not *ad nocumentum.*

1. In reſpect of their multitude, when there are enough ancient Inns before.
2. In reſpect of the inconvenience of the place or ſituation.
3. In reſpect of Diſorders there permitted.

All which are common Nuſances, and may be preſented and fined.

2. He that erects a Common Inn and *refuſes to entertain* Gueſts, may be Indicted and fined for the ſame.

3. If a Common-Inn, contrary to Statute, ſuffer perſons to tipple there as Ale-houſes, he may be compelled to be bound; or may be ſuppreſſed as Ale-houſes; or may be Indicted at Seſſions.

Ale-

Ale-houſes.

SEE for *Ale-houſes*, the ſuppreſſing of them, and the puniſhing of tippling in them, 5 *E.* 6. *c.* 25. 1 *Jac. c.* 9. 4 *Jac. c.* 5. 7 *Jac. c.* 10. 21 *Jac. c.* 7. 1 *Car. c.* 4. 3 *Car. c.* 3.

An Ale-houſe-keeper ſuppreſſed according to the Stat. of 5 *E.* 6. *c.* 25. by two Juſtices, whereof one of the *Quorum*, cannot be allowed but in open Seſſions.

An Ale-houſe-keeper ſuppreſſed for the Offences 7 *Jac. c.* 18. 21 *Jac. c.* 7. for ſuffering tippling, or 7 *Jac. c.* 10. for ſelling leſs than is there directed, or 21 *Jac. c.* 7. for continuing drinking in another Ale-houſe, or 21 *Jac.* for being drunk, cannot be licenſed in three years, and if he be, ſuch Licenſe void.

Stat. 6 *E.* 6. *c.* 25.

None to ſell Ale, &c. unleſs licenſed in open Seſſions, or by two Juſtices, one of the *Quorum*.

Perſons licenſed to be bound by Recogn. not to keep unlawful Games, and for uſing good Order.

Recogn. return next Quar. Seſſions.

Proceſs upon Recogn. at Seſſions.

Perſons unlicenſed keeping Alehouſe impriſoned by two Juſtices, one of the *Quorum*, for three days, and till Recogn. given not to ſell Ale.

Certificate of ſuch Recogn. Conviction, and Fine 20 *s.*

1 *Jac. c.* 9.

Ale-man, Inn-keeper or Victualler *ſuffering* Inhabitant to ſit *tippling*, forfeit 10 *s.* to the Poor.

Conviction before one Juſtice, &c. by two Witneſſes.

Penalties levied by Conſtables and Churchwardens by Diſtreſs and Sale within ſix days.

In default of diſtreſs Offender committed till payment *per* Juſtice.

Conſtables, &c. neglecting to levy or certifie default of diſtreſs, forfeits 40 *s.*

14 *Jac. c.* 5.

Perſon drunk forfeits 5 *s.* to be paid, within a week after Conviction, to the poor: If neglect, levy by diſtreſs, by Warrant from Juſtice; If not able to pay commit to ſtocks for ſix hours.

Conſtable neglecting duty forf. 10 *s.* to the uſe of the Poor.

Any perſon *ſitting tippling* dwelling in the ſame Pariſh, forf. 3 *s.* 4 *d.* to poor, proved before Juſtice, levy *per* diſtreſs, and for want of diſtreſs commit *per* Juſtice to Houſe of Correction.

Second offence bound to good Behavior.

Conſtables, &c. bound by Oaths to preſent Offences.

Puniſhment within ſix moneths.

21 *Jac. cap.* 7.

Former act extend to Forreiners, as well as Inhabitants.

One Witneſs ſuffice to convict, or view of Juſtice.

Ale-houſe ſuppreſs not licenſed for three years *per* Stat. 7 *Jac. c.* 10.

1 *Car. cap.* 4. Former Stat. extend to Inn-Keepers and Taverns.

Offences

Offences not Capital by Statute.

OFfences not Capital more particularly *by Statute.*

Forgery by Stat. 5 *El. c.* 14.

Perjury, and Subornation thereof 5 *El. c.* 9.

Champerty, *Embracery* and *Maintainance*, 32 *H.* 8. *c.* 9.

Ingrossing, *Foreſtalling*, and *Regrating*, 5 E. 6. 14.

Salt Victual within Statute.

Apples and Cherries, &c. no Victual.

Mault ſeems not, but Corn and Grain expreſly Victual by 5 *Ed.* 6.

A Stranger, or Subject, bringing Victual into the Realm, may ſell them in groſs, but the Vendee cannot; neither may any Merchant buy within the Realm, and ſell in groſs.

Attempting to inhance the price of Merchandize a kind of foreſtalling.

Selling Corn in the Sheaf unlawful.

Matters

Matters of Religion.

1. REviling the Sacraments, Imprisonment, Fine, and Ransom, 1 *E.* 6. *c.* 1. *Repealed*, 1 *Ma. c.* 2. revived 1 *El. c.* 7.

2. Not coming to Church to hear Common Prayer, by 5 *E.* 6. *c.* 1. subject to Church Censures.

Nota, 3 *E.* 6. *c.* 1. settled a Book of *Common Prayer*; Injoyned the use: Refusing to use it, using other, or depraving it, Imprisonment for six moneths for first offence, twelve moneths for second, during life for third.

5 *E.* 6. *c.* 1. Alters the Prayers, But applies the Penalty to the new Book.

Nota, *Repeal* 1 *Ma.* that *Repealed* 1 *Jac. c.* 25.

1 *El. c.* 2. Enacts the use of the Book of 5 *E.* 6. with some Alterations.

Any that,

1. Refuse to use it;

2. Use

2. Uſe another form;

3. Deprave it.

§. If Spiritual, ſix moneths Impriſonment firſt Offence; one years Impriſonment ſecond Offence, Deprivation third Offence.

If Lay, firſt Offence twelve moneths Impriſonment, ſecond Offence during life.

Depraving Book of Common-Prayer, firſt offence 100 Marks; ſecond offence 400 Marks; third offence forf. Goods, and Impriſonment during life.

8 *El. c.* 1. touching Conſecrating Biſhops.

Concerning repair to Church.

1 *El.* 2, Every Sunday and Holiday *ſub pena* 12 *d. per diem.*

§. 23 *El. c.* 1. 20 *l. per menſem* for abſenting; and if abſent twelve moneths upon Certificate, bound to good behaviour.

29 *El. c.* 2. Conviction of Recuſancy.

35 *El. c.* 1. Penalty of diſſwading from Church; holding of Conventicles; commit to Priſon without bail until Conformity. Non-

Nonconformity within 3 moneths after Conviction, ſhall abjure the Realm.

Not departing, or returning, felony without benefit of Clergy.

Submitting diſcharged of the Penalty by this Act.

Relapſing loſeth the benefit of the Submiſſion.

Ten pounds *per menſem* for every perſon retaining or relieving Recuſant after notice.

Cap. 2. Recuſants not to remove five miles from dwelling.

1 *Jac. c.* 4. Conformable heir of a Recuſant diſcharged: third part diſch. of forfeiture.

Penalty of ſending Children to Seminaries.

3 *Jac. c.* 4. & 5. Penalty for refuſing Oath of Supremacy.

1 *El. c.* 1.

5 *El. c.* 1.

Of Obedience.

3 *Jac. c.* 4.

7 *Jac. c.* 6.

Kings

Kings Bench.

NOW we come to consider of the *Proceeding* against a party for Felony, and therein

1. Concerning the *Jurisdiction or Court* wherein Proceedings are to be had in Capital Causes; and those are principally,
   1. The Kings Bench.
   2. Justices of Goal Delivery.
   3. Justices of Oyer and Terminer and Assizes.
   4. The Sheriff and Coroner.
   5. The Lord Steward of the Houshold.

The *Kings Bench* the Supream Court of Criminal Jurisdiction. It is a Court of Oyer and Terminer, Goal Delivery, and Eyre, in that County where it sits.

9 R. *Sanchar's* Case. By the coming of the Kings Bench into any County, during the sitting thereof in that County, all power and proceedings of Commissioners of Oyer and Terminer is suspended.

But

But a Special Commission of Oyer and Terminer bearing *Teste* in the Term may be granted; and Kings Bench may adjourn, and then they may sit. C. P. C. p. 27.

Where the Kings Bench proceeds upon an Offence committed in the same County, there need not fifteen days between the *Teste* and Return of the *Venire facias*; But if they proceed upon a Cause removed by *Certiorari*, they must have fifteen days. 9 Rep. *Sanchar's* Case.

Goal Delivery.

C. Jur. Courts sub hoc titulo.

THe Justices of Peace ought to deliver the Indictments not determined unto these Judges, and they may Arreign any person in Prison upon them.

2. They may take Indictments against any person in Prison, and so may Justices of Oyer and Terminer, and herein they have a concurrent Jurisdiction.

3. They may take a Pannel returned by the Sheriff without a Precept.

4. They may deliver by Proclamation persons suspected, where there is no Evidence to Indict them.

5. May award Execution of persons in Prison utlawed before Justices of Peace.

6. May assign Coroner to an Appeal, and make Process against the Appellee in a Foreign County.

7. May punish those that unduly bail Prisoners, Stat. *de Finibus*, 1 & 2 *Ph. & Ma. c.* 13.

8. May

8. May deliver the Goal of persons committed for High Treason.

9. May Receive Appeals by Bill against persons in Prison.

10. By Stat. 9 *E.* 3. 15. must send their Records into the Treasury of the Exechequer at *Michaelmas*.

11. Others may be added to the former Commission by Commission of Association, or their power committed to fewer by *Si non Omnes*.

12. By Stat. 2 & 3 *Ph. & Ma. c.* 18. a General Commission of Goal Delivery through the County determines not a Special Commission granted in a Corporation, &c. parcel thereof.

13. By Stat. 1 *E.* 6. *c.* 7. the subsequent Commissioners of Goal Delivery, power to give Judgment upon such as were Repreived before Judgment by former Commissioners and Process before any former Commissioners of Peace, Goal Delivery, Oyer and Terminer, or others not discontinued by granting new Commissions.

If a Prisoner be bailed, he is yet in

in Prison to be Arreigned before these Justices, for he is a Prisoner: contrary in case of Mainprize, 21 *H.* 7. 33. 9 *E.* 4. 2. 39 *H.* 6. 27.

Cr. Jur. 226. Although their Commission determine with their Session, after they are gone, they may command a Reprieve or Execution, *Dyer* 205.

Licet soit ad Gaolam deliberandum hac vice encore poet adjourner lour Commission, Cr. Jur. 226.

Commission a Oyer & Terminer, & Goal Delivery, poet Estroyer ensemble, Ibid. Bro. Commission 44.

Justices de Goal Delivery & Oyer & Terminer, poet enquire per ambideux powers, and make up their Records accordingly, 9 *E.* 4. Cr. Jur. 226.

Oyer and Terminer.

1. THe Justices Authority must be by Commission, and not by Writ, otherwise their Proceedings void. 42 *Ass.* 12.

2. They cannot proceed but upon an Indictment taken before themselves.

3. By good Opinion they may proceed the same day or Session against a party Indicted before them. *Nota le contrar' ad estre adjudge.*

4. Where Offences are limited to be heard and determined in any Court of Record, generally it may be heard and determined by them. *Quere* for *Gregory's* Case *contra.* V. *Dy.* 236.

5. Others may be added, or their power contracted by Association, or *Si non omnes*, as before.

6. One sitting without Adjournment determines their Commission.

7. Justices of Oyer and Terminer, or of Peace, cannot assign a Coroner, as Justices of Goal Delivery may.

8. By Stat. 9 E. 3. they are also to send their Records determined into the *Exchequer*.

V. 12 Ass. 21. 9. A *Superfedeas* suspends their power, and a *Procedendo* revives it; but a new Commission determines it; the like of Commission of *Nisi prius*, &c. but it determines not without notice.

1. By shewing the new Commission.

V. 2 & 3 P. & M. c. 10. 2. Or proclaiming it in the County.

3. Or Sessions held by new Commission.

10. An Award upon the Roll not sufficient to return a Jury, but a Precept under Seal of the Commissioners.

11. And *Note*, That a special Commission of Oyer and Terminer may be granted to sit in one County to hear and determine Treasons, &c. in another, but then the Indictment must

must be found in proper County, and the Trial by Jurors of proper County. *C. PC. fo.27.*

M 2 *Justices*

Justices of Assise.

BY Stat. 27 *E.* 1. *c.* 3. *de finibus* Justices of Assise have power to deliver Goals of Felons and Murderers.

And by some opinion they may do it *virtute officii*, without any special Commission. *S. PC. c.* 5.

But in case of Counterfeiting Coin, &c. upon Stat. 3 *H.* 5. *Stat.* 2. *c.* 7. they must have a Special Commission.

Justices

Justice of Peace.

THE Stat. of 18 *E.* 3. *c.* 2. gives them power by Commission to hear and determine Felonies and Trespasses against the Peace.

But then there must be a special Clause in their Commission, *Necnon ad aud' & terminand' felonias*, &c. Otherwise they cannot do it. S. P.C.L.3.c.5.

Yet that Clause doth not in propriety make the Justices of Peace Justices of Oyer and Terminer, because that it is a distinct Commission; and therefore a Statute, as that of 5 *El. c.* 14. limiting Forgery to be heard and determined before Justices of Oyer and Terminer, gives not the power therein to Justices of Peace; but the Justices of the Kings Bench are Justices of Oyer and Terminer within that Statute. V. C.P.C.c.14. Dal. c. 20. 9 Rep. 118.

By force of the general words of their Commission they may enquire of Murder at their Sessions; for though by Stat. 6 *E.* 1. *c.* 9. Dy. 67.

and 4 *E.* 3. Murders and other Homicides must stay till Goal Delivery; yet the Stat. of 18 *E.* 3. *c.* 2. 34 *E.* 3. *c.* 1. 17 *R.* 2. *c.* 10. hath enlarged their Commission and Power.

Yet in respect the Stat. 1 & 2 *Ph. & Ma. c.* 13. directs Justices of Peace to take Examinations in Cases of Homicide and other Felonies, and to certifie them to the Justices of Goal Delivery: in point of Discretion they do forbear to proceed to determine great Felonies.

Dal. c. 30. But for Petit Larceny, and other small Felonies, they use to bind over the Prosecutor to the Sessions.

The Justices of Peace may proceed upon Indictments taken before themselves, or former Justices of Peace: but cannot proceed upon Indictments before Coroner, or Oyer and Terminer; but Justices of Goal Delivery may; and the Justices of Peace are to deliver the Indictments taken before them to the Justices of Goal Delivery, by Stat. 4 *E.* 3. *c.* 2.

By Stat. 4 E. 3. c. 2.

They

They cannot deliver persons suspect by Proclamation, as Justices of Goal Delivery may. Cr. f. 9.

In Cases of Felonies by Statute limited to be heard before Justices of Peace, they may proceed at Sessions; and consequently may bind over Informers, and certifie Examinations at Sessions.

But such Felonies by Statute as are specially limitted to Justices of Oyer and Terminer, or other Justices, and not to them, the Justices of Peace cannot proceed to take Indictments, as upon Stat. 3 *H.* 7. *c.* 18. for contriving to destroy the King, &c. upon Stat. 33 *H.* 8. *c.* 12. Murderers in the Kings Palace; upon Stat. 18 *H.* 6. *c.* 12. of razing or imbezelling Records; upon Stat. 5 *El. r.* of Forgery; upon Stat. 19 *H.* 6. *c.* 1. secret imbezelling goods, &c. upon Stat. 2 & 3 *Ed.* 6. *c.* 24. striken in one City, and dies in another, or accessary in another County.

But in the former cases it seems they may take the Examinations, Dal. c. 20.

and commit the Offenders, and bind over Prosecutors.

If any Indictment be taken before Justices of Oyer and Terminer, Goal Delivery, or Coroner, they cannot proceed upon them; but upon Indictments taken before the Sheriff in his Turn, they may proceed by Stat. 1 *E.* 4. *c.* 2.

In cases of Treason, Misprision of Treason, or Premunire, regularly Justices of Peace have no Jurisdiction; yet two things may be done:

Lalt. c. 90. 1. In any case of Treason, because it is a breach of the Peace, they may upon complaint imprison Offenders, take Examinations, bind Prosecutors over, and certifie their proceedings into Kings Bench or Goal Delivery.

Dal. c. 2. 2. In some cases they are enabled to take Indictments, but not to hear and determine the same, but certifie the same into the Kings Bench upon Stat. of 5 & 23 *El.*

1. Maintainer of Authority of the See of *Rome.*

2. Obtaining Bulls, &c.

3. With-

3. Withdrawing from Allegiance.

4. Bringing in *Agnus Dei*, &c.

A person bringing one before a Justice suspect of Felony, and refusing to be bound to prosecute, may be committed, if it appear he can testifie materially.

They may Enquire of any Felony within the County, though within the Verge. 4 *R. Wigg's* Case.

Coroner.

Coroner.

HAth power in three Cases;

1. To take Indictments of Death; but this he can only do *super visum corporis*, otherwise void. Hence

St. PC. f. 52.

1. If the Body be interred before he come, the Township amerced, and he must digg up the Body; ſo if the Townſhip ſuffer the Body to lie long to Putrefaction without ſending for the Coroner: The like of one dying in Priſon.
2. If the Coroner be remiſs, and comes not being ſent for, he ſhall be fined and impriſoned.
3. He may enquire of flight, and ſuch Preſentment not Traverſable.
4. If the Body cannot be ſeen the Juſtices of the Peace may enquire thereof.

Nota,

Nota, The Record of the Coroner of great Authority; if he Record a Confeſſion of a Felony by Approver, or a Confeſſion of breach of Priſon, or an Abjuration, it ſhall not be Traverſed.

8. Jury dat' Coroner acquit perſon occiſe dat' enquire quis occidit. 11 *E.* 4. 3. 14 *H.* 7. 2.

And it ſeems by ſome he hath power to enquire of Rape, Breach of Priſon.

He hath Juriſdiction upon Arms of the Sea, where a man may ſee from ſide to ſide.

2. Concerning *Appeals*.

The Coroner, together with the Sheriff, hath power in the County Court to receive Appeals of Robbery and other Felonies; But then it muſt be of a Felony in the ſame County: Upon this Appeal they may grant Proceſs till utlary; but it ſeems they cannot ſend an *Exigent*, becauſe prohibited by Stat. of *Magna Cart. c.* 17.

St. PC. fo. 52.

Such Appeal may be by Bill; and it may be removed into Kings Bench by *Certiorari*, but it muſt iſſue both to Sheriff and Coroner, and not to Sheriff only.

St. P.C. fo. 64.

It

It appears by Stat. 3 *H.* 7. *c.* 1. That an Appeal of Murder by Bill lies before Sheriff and Coroner.

3. The Coroner alone may take the Appeal of an *Approver* of a Felony in any County.

St. P. C. f. 53. But then he cannot make Proceſs thereupon, but enter it in his Roll, and ſend it to the Juſtices of Goal Delivery, who thereupon may iſſue their Proceſs to the Sheriff of the foreign County to take the Appellee.

4. To take the *Abjuration* of him that acknowledges a Felony done in the ſame County, or any other.

And note, That though more Coroners than one in any County, yet any one may exerciſe any of the powers before.

But the Preſentment of him that is firſt taken ſtands.

Sheriff.

THE power of the Sheriff to take Indictments, was either *virtute Commissionis*, which is taken away by the Stat. 28 *E.* 3. *c.* 9. *Officii*; in his Turn: wherein

1. The *Turns* must be held *infra* St. P. C. f. 84. *mensem Paschæ & Michaelis*; otherwise the Indictments there are void *per Stat.* 31 *E.* 3. *c.* 14.

2. The Indictments must be under Seal of the Jury by Stat. of *West.* 2. *c.* 13. indented *per Stat.* 1 *E.* 3. *c.* 17. and the same for Lords of Franchises.

3. The Indictors must be of good name, having 20 *s.* Freehold, or 26 *s.* 8 *d.* Copyhold; otherwise Sheriff punishable by Stat. 1 *R.* 3. *c.* 4.

4. The Turn can take no Indictment but of that which is Felony by Common Law, or of such matters as are particularly by Act of Parliament limited to them, and therefore

fore an Indictment of Rape void there.

5. Upon any Indictment of Felony before the Sheriff in his Turn, they can make out no Proceſs, but muſt ſend them to the Juſtices of Peace, who have power to proceed thereupon as if taken before themſelves, by Stat. 1 E. 4. c. 2.

Court-

Court-Leet.

THE *Court-Leet* hath in effect the ſame Juriſdiction with the Turn, but Preſentments of Felony before them are to be ſent before Juſtices of Goal Delivery, 2 Hal. 18.

The means of bringing Capital Offenders to Trial.

HAving considered the Courts of Justice, now we come to consider the means of bringing Capital Offenders to their Trial; and that is Regularly by one of these three ways;

Appeal.
Approver.
Indictment.

And herein some things are proper to each proceeding.

§. Some things are common to them all, which come to be considered after particulars, proper to either, dispatched, *viz.*

Process.

Arraignment; and therein of Principal and Accessary.

Demeanour of the Party Arraigned;

Standing

Standing Mute.
Confessing.
Pleading and Pleas.

Declinatory,
Sanctuary.
Clergy.

In Barr,
Pardon.
Auterfoits Acquit.
Auterfoits Convict.

To the Felony.
Trial,
By Battel.
By Jury, and therein
Proces against the
Jury.
Challenge.
Evidence.
Verdict.
By Peers in case of
Nobility.

A

N Judg-

Judgment in the ſeveral Caſes Capital.

Execution.
Reprieve.
Falſifier.
By Errour.
By Plea.

Appeal.

Appeal.

Appeals in reſpect of the *manner* of proceeding, are of two kinds;

1. By Writ.
2. By Bill.

Touching Appeals *by Bill*, they may be proſecuted.

1. In the King's Bench againſt any that is *in cuſtodia Mariſcalli*, or let to bail: they are the Soveraign Coroners.

2. In the Court before Commiſſioners of Goal Delivery againſt a Priſoner, or one let to Bail, but not of one let to Mainprize.

But if one of the Appellees abſent, remove in *B. R.* by *Certiorari*.

3. By ſome before Juſtices of Peace, *quod Quære* 44 *E.* 3. *Coron.* 95.

4. Before Sheriff and Coroner, as before; and it may be removed by *Certiorari* in *B. R.* 3 *H.* 7. *c.* 1.

5. Before the Conſtable and Marſhal, of a Felony done out of the Realm, 1 *H.* 4. *c.* 14.

In relation to the *Matter*.

Appeals are in matter.

1. *Not Capital*, as an Appeal of Maihim, which may be commenced in Kings Bench, Goal Delivery, or before Coroner and Sheriff.

This, though it be *felonice*, yet is but a Treſpaſs in its Nature and Judgment.

2. *Capital*; and that either

1. Of *Treaſon*; but this ouſted *by Stat.* 1 *H.* 4. *c.* 14.

2. Of *Felony*; and theſe of three kinds,

1. Of Death.

2. Of Larceny.

3. Of Rape.

Appeal of Death.

AN Appeal *of Death* is either by the Wife or Heir.

1. Appeal of Death *by the Wife*; and therein theſe *requiſites*;

1. She ought to be a wife *de jure*, and not *de facto* only; and therefore *ne unq; onc' accouple* a good Plea.
2. But ſhe need not be dowable; for if ſhe had Elopped, or the Huſband been Attaint; yet ſhe may have an Appeal of his death.
3. She ought to continue his Widow; for if ſhe marry before, or pending the Appeal, the Appeal fails for ever; or if ſhe marry after Judgment ſhe cannot have Execution.

2. Appeal of Death *by the Heir*.

1. If the dead hath a wife, the heir ſhall not have Appeal though ſhe die within the year: but if the Wife

kill the Husband, there the Heir shall have an Appeal.

2. He must be Heir by course of Common Law; this hath these Exceptions:

1. Where Heir is disabled by Attainder.

2. Where the Appeal is against the Heir; in these cases it goes to the next Heir, as if the other were dead without issue.

3. It must be by Heir that was Heir at time of death of Ancestor; for if he die within the year before, or after Appeal commenced, it is lost.

But it seems if the Heir having Judgment die, his Heir may have Execution.

4. It must be an Heir and Male; *Nullus capiatur propter Appellum feminæ alterius quam viri sui*: But if be Heir, and Male, though he derive through Females,

Females, he may have an Appeal. C. Lit.

5. A man above Seventy, or an Infant, may have Appeal; but no Battel waged, and adjudged of late times the Paroll ſhall not Demurr. *Sed quære.*

But an Ideot, Monk, or Man mute, ſhall have no Appeal, neither of death, nor otherwiſe.

And Note, the Appeal of death muſt be within year and day after death by Stat. 3 *E.* 6. *c.* 24. ſtriken in one County, and dies in another; or Acceſſary in one County, to death in another; Appeal brought where party died. C. P. C. 53.

Appeal of Robbery.

Servant robbed, Maſter or Servant may have Appeal.

But Teſtator robbed, Executors ſhall not have Appeal.

Villain ſhall not have Appeal of Robbery againſt his Lord; *contra* of death.

Two joint Owners robbed, Surviver ſhall have Appeal.

A Woman or Infant ſhall have an Appeal of Robbery.

If a man be robbed at ſeveral times, he muſt put all into one Appeal.

What omitted is Confiſcate.

The Appeal affirms the continuation of the property. Therefore if *A.* rob *B.* in the County of *S.* and go with the Goods in the County of *D.* an Appeal of Larceny lies in the County of *D.* but not of Robbery, for that is upon a taking from the perſon.

If *A.* be robbed by *B.* who is robbed by *C.* *A.* may have an Appeal of Larceny againſt *C.* This

This Appeal may be profecuted in a year, two, or three, if there was freſh ſuit; and the judging of freſh ſuit lies in the diſcretion of the Court.

And Note, This, or any other Appeal lies againſt an Infant, againſt a Monk, without naming his Sovereign, againſt a Feme covert without naming her Huſband.

Appeal

Appeal of Rape.

Appeal of Rape

1. Lies for the party raviſhed.

2. But if ſhe conſented to the Rape afterwards, then by Stat. *6 R. 2. c. 6.* it is given to the Huſband; if none, to the Father; if none, to the Heir, whether Male or Female.

If ſhe be taken in one County, and raviſhed in another, the Appeal of Rape lies in that County where actually raviſhed.

Although by Stat. *W. 1. c.* 13. whereby Rape was turned into Treſpaſs, forty days is limited for her Suit; yet it being again made Felony by Stat. *W. 2. c.* and no time limited for it, it may be brought in any reaſonable time.

Proceſs

Proceſs in Appeal.

Concerning Proceſs in Appeals, *v. infra* Proceſs in general, becauſe many things therein common to Appeals and Indictments.

The *Count* in an Appeal.

1. The Plaintiff in his Appeal muſt mention the place and day; need not mention the hour; and though day be miſtaken, not material upon Evidence.

2. It ſufficeth for Plaintiff to count againſt Defendant, according to the conſtruction that the Law maketh upon the Fact.

If *A. B.* and *C.* preſent, and *B.* only ſtrike the mortal ſtroke, he may count againſt them all, that they ſtroke: So in Rape.

3. An Appeal by Heir ought to ſhew *Coment.*

4. In Appeal of Rape, *felonice rapuit* ſufficient without ſaying *carnaliter cognovit, vid.* 11 H. 4. 1.

5. In

5. In Appeal againſt *A. B.* and *C. A.* only appears, he muſt count againſt all by the better Opinion.

6. At this day but one Appeal againſt all Principals and Acceſſaries, and if an Appeal be againſt *A.* and he is attaint or acquit, or Plaintiff non-ſuit, he cannot have another Appeal againſt *B.* But if Acceſſary in one County to Felony in another, their ſeveral Appeals againſt Principal and Acceſſaries.

Pleas to the Writ and in Bar.

Writ of Appeal abate,

1. For insufficiency in the Writ, as wanting *rapuit*, false Latin, &c.

2. Multiplicity of Action; a second Writ of Appeal purchased, pending a former Writ abates; but if pending a former in the County abates not.

But if the first Appeal by Bill be removed into the Bench by *Certiorari*, and the Plaintiff had appeared thereupon, and counted, abates the second Writ.

Nul tiel in rerum natura, as one of the Defendants, abates *versus tous*, &c.

Pleas

Pleas in Barr.

Vid. infra in ceo general Title as to *Autrefoits Convict or Acquit.*

C. PC. 98. 1. He may plead any thing whereby it appears the Plaintiff is not intituled to the Appeal *de quo v. supra.*

2. Nonſuit in a former Appeal after Declaration, ſo of a *Retraxit.*

3. The Plaintiff brought an Appeal of the ſame Felony. Felony againſt another, who was acquit or attaint at his Suit.

4. Plaintiff hath releaſed to Defendant; but if Appeal againſt Divorce, a Releaſe or *Retraxit* as to one no barr for the other.

5. If Defendant plead in Barr, he may alſo plead over to the Felony, and it ſhall not be double.

1. But in caſe of a Releaſe pleaded, he ſhall not plead over to the Felony, becauſe repugnant.

2. In

2. In case of Villenage pleaded he shall not plead to the Felony, because Infranchisement; yet if that barr found against him, he may plead not Guilty; and so in any other case where he pleads in Barr without pleading over except Release.

Approver.

Approver.

C. PC. c. 65.
S. PC. f. 142.

1. WHAT it is to be an Approver?

A perſon Indicted of Treaſon or Felony not diſabled to accuſe before competent Judges, confeſſing the Indictment, and ſworn to reveal all Treaſons and Felonies he knows, and then before a Coroner entring his Appeal againſt *participes Criminis* in the Indictment within the Realm.

2. Who may be an Approver, and who not?

1. A Peer of the Realm cannot be an Approver.
2. A perſon Attaint cannot be an Approver; nor a perſon out of Priſon, though indicted.
3. A Woman, Infant, Ideot, *Non compos*, Clerk, cannot be Approver.
4. But a man above ſeventy, or maimed may, but he ſhall not wage Battel.

5. Clerk

5. Clerk Convict may.

3. In what caſes?

1. None can approve but an Indicted; and therefore if only in Priſon upon ſuſpicion, he may indeed confeſs the Felony, but ſuch Confeſſion amounteth not to an Attainder or Conviction, though it be an Evidence, and therefore cannot approve.

2. The Apellee in Appeal cannot be an Approver.

3. The Appellee of Approver cannot be Approver, for that would be infinite.

4. Though a perſon Indicted approve, yet if after an Appeal be againſt him, the Approvement ceaſeth.

5. He that hath once pleaded to the Felony cannot be Approver, but ſhall be hanged, for he is found falſe.

4. Of what Offences?

It must be only of the Offences contained in the Indictment, be it Felony or Treason, and therefore not of another Offence, nor of an Accessary before or after to the same offence; yet his Oath general, therefore as to other Offences, it is but a Detection, not an Approvement.

5. Before whom?

Before such Judges only as can assign a Coroner, as Kings Bench, Goal Delivery, Oyer and Terminer, High Steward; but not before Justices of Peace, Court Baron, or County Court.

But it is in the discretion of the Court either to suffer him to be Approver, or to respite Judgment and Execution, till he hath Convicted all his Partners.

6. How Demeasned after Appeal?

1. After Felony confessed upon the Arraignment, a Coroner assigned and sworn in Court to discover Offenders.

2. A

2. A day prefixt, within which he is to perfect his Appeal before the Coroner, and in every of these days he must Appeal; for if he fail in any, and the Coroner record it, he is to be hanged.

The time limited to perfect his Appeal by 5 *E.* 2. *c.*34. is three days, but that Repealed 15 *E.* 2.

3. During the time limited for his Appeal, he shall be at large, and have 1 *d. per diem* till his Appeal finished.

4. If he Appeal persons beyond Sea, or such as are not in *rerum natura*, and that appear by Testimony of Country, or by Return of Sheriff, *quod non fuit inventus*, he shall be hanged.

5. After his Appeal formed before the Coroner, he must repeat it *verbatim* before the Court; and if he fail

thereof, and the Coroner Record it, he ſhall be hanged.

7. *Proceſs* in Appeal.

1. In the ſame County the Coroner may award Proceſs to the Sheriff till Exigent.

2. If Appellee be in a foreign County, then the Judges before whom the Appeal is, may grant Proceſs, *viz.* *B. R.* or *Itinerant* by Common Law: and by Stat. 28 *E.* 1. *de Appellatis* the Juſtices of Goal Delivery may ſend Proceſs into a foreign County, as well to apprehend the Appellee, as a *Venire Facias* to try the Iſſue.

S. PC. f. 146.

8. *Proceeding* upon *Trial.*

The Appellee may put himſelf upon the Country, or wage Battel.

If five Appellees, and they wage Battel, he muſt fight them all.

If two Approvers againſt one Appellee, if the Appellee vanquiſh the firſt, he is acquitted againſt the reſt: though

though Appellor retract his Appeal, or be vanquiſhed; yet if the Offence be within Clergy he ſhall have it; and ſo of the Appellee.

9. Proceeding after Trial.

If the Appellor convict the Appellee, either by Battel or Verdict, the King *ex merito juſtitiæ* is to pardon him; and from the time of his Appeal till his Pardon or Conviction, ought to have wages.

Indictments.

THESE things considerable:

1. Where an Indictment requisite in cases Capital, and where not.

2. What the quality of Indictors.

3. Of what matters they may Enquire.

4. Before whom found.

5. What requisite in the manner of them.

1. Where an Indictment requisite for a party to be Arraigned at the King's Suit.

1. By the ancient Law, if a man was taken in Larceny with the manner, and that brought into Court with the Prisoner, the Prisoner should be Arraigned thereupon without any Indictment. *Stat. P. C. f.* 148.

And such was the use of those Mannors that had Infangthef, *Ibid. f.* 29. *v.* 1 *E.* 3. 17. 17 *Ass.* 49. but this disused.

2. If

2. If Treſpaſs be brought *de mu-* S. PC. f. 94.
liere abductâ cum bonis viri, and the Defendant found Guilty: or if in Treſpaſs for Goods the Defendant be found that he ſtole them; this in the Kings Bench equivalent to an Indictment, and the Defendant put to anſwer to the Felony.

3. In ſome Caſes upon Appeals by Appellors or Approvers not proſecuting, &c. the Defendant arraigned at the King's Suit; becauſe it carries a preſumption of truth; and therefore if the Defendant be both Appealed and Indicted upon a non-proſecution of the Appeal, the party ſhall be arraigned upon the Appeal, not the Indictment. 4 *E.* 4. 10.

Wherein,

1. If the Plaintiff in Appeal by S. PC. 148.
Writ be Nonſuit before Declaration, he ſhall not be arraigned at the King's Suit. 1. Becauſe no certainty. 2. The Writ may be at anothers Suit, but if it be by Bill, either by Appellor or Approver, it ſeems he ſhall, becauſe the certainty appears; therefore in the former

Caſe, if there be no Indictment againſt him, he is diſmiſſed.

2. If the Plaintiff releaſe his Appeal after he hath commenced it, the party ſhall be arraigned at Kings Suit; But if before it was commenced, then not; becauſe it was never well commenced.

3. If the Plaintiff or Approver after Appeal commenced, confeſs it falſe, or take to his Clergy, or wave his Appeal, yet arraigned at the Suit of the King: But if the Approver after Battel joyned do in the field confeſs it falſe, the Appellor hang'd, and the Appellee diſcharged, becauſe amounts to a vanquiſhment.

4. If the Appeal abate by Act of the Plaintiff, as taking Huſband; or act in Law, as death; Appellee arraigned at the King's Suit: But if it abate by inſufficiency in the Appeal, as by falſe Latin, Miſnomer, or becauſe Plaintiff diſabled to commence Appeal, as Utlary of Felony, or Treſpaſs; or the year and day paſt; or Plaintiff not Wife or Heir; Defendant, not arraigned upon Appeal, but may be Indicted. 5. If

5. If the King pardon after Battel joyned in Appeal by Approver, no Arraignment at King's Suit, but Appellee discharged.

And note, where the Prisoner arraigned upon the Appeal, a *Cesset Processus* entred upon the Indictment. S. P. C. 104.

The return of the Sheriff of Rescue or Escape of a Felon, not sufficient to put the party to answer the Felony. S. PC.

2. The second thing considerable is the quality of *the Indictor.*

Concerning Indictments in Leets and Turns, *v. ante* upon Stat. *W.* 2. *c.* 13. 1 *E.* 3. *c.* 17. 1 *R.* 3. *c.* 4. 1 *E.* 4. *c.* 3.

There is a general Statute that refers to all Indictors, as well in case of Felony as Treason, 11 *H.* 4. *c.* 9. which requires C. PC. f. 33.

1. Indictors not to be
   1. Persons fled to Sanctuary for Felony or Treason.
   2. Not outlawed.
   3. Not Indicted or Attainted.
   4. Not by Conspiracy.

2. That

2. That the Indictors be the King's Liege people.

3. Returned by the Sheriff, or Bailyes of Franchiſes.

4. Not at the nomination of any perſon.

And all Indictments taken contrary void.

Hence it follows

1. That the Priſoner upon his Arraignment may plead this matter, or any point of the Statute, and may plead over to the Felony. *Vide Scarlet's* Caſe.

2. Though there be twenty of the grand Jury, yet if one was outlawed or taken at the nomination of another, it avoids the whole Indictment.

By Stat. 3 *H.* 8. *c.* 12. Juſtices of Goal Delivery, or of Peace, whereof one of the *Quorum*, in open Seſſions may reform the Pannel of the Grand Jury, by putting in and taking out Names, and the Sheriff is to return the Pannel ſo reformed.

But this takes not away the former Statute of 11 *H.*4. nor alters it.

By

By Stat. 33 *H.* 6. *c.* 2.

Special provision is made for the quality of the Indictors in *Lancashire.*

3. Of what things they can Enquire.

Regularly they can Enquire of nothing but what ariseth within the Body of the County for which they are retorned.

And therefore if an Indictment for scandalous words, or other matter transitory be found upon not Guilty pleaded thereunto, if upon Evidence it appear to be spoken in another County, the Defendant is not guilty.

And therefore where stroke was in one County, and death in another, he could not be Indicted where party died.

But for a Nusance in one County to another, a Jury of the County where Nusance is committed may Indict it.

But divers Statutes have introduced an alteration of the Law in some Capital Cases, 28 *H.* 8. *c.* 15. Trea-

Treaſons, Felonies, Robberies, Murders, and Confederacies upon the Sea may be enquired, tried, heard, determined, and judged in ſuch Shires and places as ſhall be limited by the King's Commiſſion to be directed for the ſame.

A Treaſon done out of the Land, it hath been held that it may be enquired of and tried where the Offender had lands; but to avoid the Queſtion by Stat. 35 *H.* 8. *c.* 2. all Treaſons and Miſpriſions, or concealments of Treaſons done out of *England*, may be enquired, heard, and determined by the Juſtices of the King's Bench, by perſons of the County where the Bench ſits, or before Commiſſioners, and in ſuch Shires as ſhall be appointed by the King's Commiſſion, by good men of the ſame Shire, as if the Treaſons, &c. had been done in the ſame Shire where inquired.

Upon this Statute.

C. P. C. f. 71. 1. If the Bench remove after Indictment into another County, the Trial ſhall be by perſons of the firſt County. 2. The

2. The Kings writing his name to the Commiſſion, or putting his Signature to the Warrant, ſufficient.

3. *Ireland* is out of the Realm to this purpoſe.

Theſe Statutes ſtand unrepealed by Stat. of 1 *Ma. c.* but the Stat. of 32 *H.* 8. *c.* 4. for trial of Treaſon in *Wales* repealed by 1 *Ma.* C. PC. f. 24.

Again, by Stat. 2 *&* 3 *El. c.* 24. a man ſtricken in the County of *D.* dies in the County of *S.* or Acceſſary in one County to Felony in another County, may be indicted and tried in the County where the death was, or Felony committed by the Principal; but it muſt be laid according to truth. C. PC. 49.

If Enqueſt conceal any matter preſentable before Juſtice of Peace, they may Impannel Inqueſt to enquire of ſuch Concealments, and amerce the Concealers, by Stat. 3 *H.* 7. *c.* 1.

4. Before whom found.

Of this before.

5. The

5. The form of Indictments.

1. By Statutes:

St. PC. 4 *H.* 4. *c.* 2. *Insidiatores viarum & depopulatores agrorum*, to be omitted in Indictments; and if inserted, yet Clergy not thereby taken away.

37 *H.* 8. *c.* 8. Indictment not to be quashed for want of the words, *viz. gladiis, baculis, & cultellis.*

2. At Common Law:

1. Want of certainty vitiates; want of year, day, and place.

Indictment for Escape of one taken on suspicion of Felony, without shewing what Felony, *Male.*

Indictment for receipt of a Felon without shewing who received, *male.*

Indictment *ad magnam curiam & Letam*, *Male.*

Indictment for making Alchimy *ad instar pecuniæ Regis*, without shewing what money, *Male.*

Indictment *quod communis malefactor*, without shewing wherein, *Male.*

Indictment *quod cepit*, or *furatus est*,

eſt, without ſaying *felonice*; *abduxit equum*, without ſaying *cepit*; or *carnaliter cognovit*, without ſaying *Rapuit*; or *burgariter*, when it ſhould be for *Burglariter*; or if Felony before Juſtice of Peace, without ſaying *necnon ad diverſa felonias*, &c. or before the Major of *London* without ſaying *& Coronatore*; or of a murder with a Gun, without ſaying *percuſſit Male.*

Indictment ſuppoſing the ſtroke 1. *Auguſti*, death 2. *Auguſti*, *& ſic felonice murdravit* 1. *Auguſti*, *Male.* But *ſic murdravit modo & forma præd'*, or *præd'* 2. *Auguſti*, *Bene.*

Indictment *quod dedit mortalem plagam circa pectus*, *Male*: but *in ſiniſtra parte ventris circa umbelicum*, *Bene.*

Indictment *de morte cujuſdam ignoti*, or *felonice cepit bona*, &c. *cujuſdam ignoti*, or *domus & Eccleſiæ*, in time of vacation: good.

Indictment of Poyſoning with ſeveral ſorts of poyſon, without ſhewing of which he died: good. C. PC. c. 63.

6. *Proof*

6. *Proof upon Indictments.*

In case of Treason and Misprision by the Stat. 1 *E.* 6. *c.* 12. *&* 5 *E.* 6. *c.* 11. there ought to be two lawful Accusers, that is, witnesses upon every Indictment.

C. P. C. 24. An Accuser by hearsay is no lawful Accuser within this Statute.

The necessity of such proof upon Indictment of Treason is not taken away by Stat. 1 *E.* 1. 2. 1 *&* 2 *Ph. & Ma. c.* 11. but only in the case of counterfeiting Coin.

St. P. C. 164. But these Witnesses need not be present with the Indictors, but they may send it to them in writing.

Process.

NOW we come to those Proceedings that for the most part are common both to Appeals and Indictments. And

1. Of *Process*.

1. Upon an Indictment or Appeal *of death* but one *Capias*, and then *Exigent*: but in case of Robbery, then by Stat. 25 *E.* 3. *c.* 14. two *Capias*'s, then *Exigent*; but this Stat. extends not to death.

2. But Indictments or Appeals of Treason, or any Felony, or Trespass *against a person of another County*, after one *Cap.* a second *Cap.* with Proclamations, shall be granted to the Sheriff of that County wherein he is supposed to be conversant before an *Exigent* shall issue by *Stat.* 8 *H.* 6. *c.* 10. And

upon this Statute Proceſs ſhall go to a County Palatine; and if in the Indictment he be ſtiled *nuper de D.* and ſo in ſeveral Counties, the ſecond *Cap.* ſhall go to every County.

S. PC. fo. 67. 3. In Appeal or Indictment *againſt Principal and Acceſſary*, by *Stat. W.* 1. *c.* 14. Proceſs of Utlary muſt ſtay againſt Acceſſary till Principal attaint.

But if it be an Appeal *by Writ* which is general till Declaration, the Plaintiff muſt at his peril diſtinguiſh the Proceſs; for if he take his *Exigent* againſt all, he muſt Count againſt all as Principals.

An Appeal *againſt divers*, one appears and pleads to the Writ, or in Barr, which goes to all, Proceſs of Utlary ſhall ſtay againſt the reſt till Plea determined.

An

An Indictment or Appeal may be *removed* in *B. R.* by *Certiorari*, but it muſt accord with the Appeal.

Upon an Appeal removed by *Certiorari*, the Plaintiff is without day; and to compel the Plaintiff to proceed, the Defendant may take out a *Scire Facias*, and upon two *Nihils* or a *Scire Feci*, and default, Defendant diſcharged.

But the Plaintiff upon ſuch Appeal removed, may have *Capias & Exigent.*

If the Defendant comes in by *Capias*, and after appearance make default, a new *Capias*; if upon *Exigent*, a new *Exigent*; and upon ſecond appearance, ſhall plead *de novo*, for the firſt Iſſue and Inqueſt is *ſine die.*

Arraignment.

1. IN what *manner* a Perſon is to be Arrained?

The Priſoner, at the time of his Arrainment ought not to be in Irons.

2. Where arrained *upon ſeveral Appeals or Indictments.*

St. PC. f. 66.

If a man be indicted or appealed of Robbery or Death at the Suit of one, he ſhall be Arrained and Tried at the Suit of another, becauſe they have ſeveral intereſts in the Judgments.

And now the ſame Law is of an Indictment of Robbery, becauſe by Stat. 21 *H.* 8. *c.* 11. the party is to have Reſtitution.

But if the Appeal by one be not commenced till after an Attainder at the Suit of another, he ſhall not be Arrained upon the other Suit;

But if the firſt Attainder be pardoned, he ſhall be Arrained upon the

the ſecond Appeal commenced after the Attainder.

But after an Attainder of Felony, he may be Arraigned for Treaſon for the King's Intereſt.

By the Common Law, a Clerk convict ſhould have anſwered all Felonies, and were acquit or convict at the Suit of others.

But this was remedied by *Stat.* 25 *E.* 3. *c.* 4. *pro Clero.* And therefore after that Stat. the Clerk convict and delivered to the Ordinary, was diſcharged of all former Felonies whereof he was not Arraigned before Clergy; and that although thoſe other Offences were not within Clergy. *Dyer* 214.

But now by Stat. 8 *El. c.* 4. after Purgation, and 18 *El. c.* 7. after burning in the hand, he ſhall be put to anſwer former Felonies upon Appeal or Indictment. *vid. infra in auterfoits acquit & convict.*

3. Concerning the *Arrainment of Principal and Acceſſary.*

1. Who ſhall be ſaid an Acceſſary
   before,
   after.
2. How the Proceeding ſhall be
againſt them upon their Arrain-
ment?

Principal and Accessary.

1. WHO an *Accessary?*

1. In Treason no Accessaries, but all Principals; But a Procurer before, or a Receiver knowingly after, is guilty as Principal in High Treason. C. P. C. f. 138.
2. Where an Act of Parliament makes a Felony, it doth incidently make such Accessaries as would be Accessaries before or after to a Felony at Common Law; as in Case of Buggery, Rape, &c. C. P. C. f. 59.
3. The Accessary cannot be guilty of Petty Treason where the Principal is but Murder.
4. If divers come to commit an unlawful act, and be present at the time of Felony committed, though one of them only doth it, they are all Principals.

So if one present move the other to strike: or if one present did nothing, but yet came to assist party if need; or if one hold the party while the Felon strikes him; or if one present deliver his weapon to the other that strikes; for they are *præsentes, auxiliantes, abettantes*, or *confortantes*.

S. P. C. f. 40. But if one came casually, not of the Confederacy, though he hindered not the Felony, he is neither Principal not Accessary, although he apprehend not the Felon.

5. In some cases a person *absent* may be Principal.

4. Rep. 44. *Vaux's* Case. S. P. C. 138. 1. He that puts poison into any thing to poison another, and leaves it, though not present when taken: And so it seems are all that are present when the poison is so infused, and consenting thereto.

2. If upon the same Ground, or in the same House, though not within view of the Fact, when many come

come to do an unlawful act? See before Lord *Ducres* Case, and *Pudsey*'s Case in Murder and Robbery.

3. By special Act of Parliament, as upon the Stat. 3 *H.* 7. *c.* 2. 8 *H.* 6. 12.

2. Accessaries *before*; he that commandeth or assenteth to the committing of a Felony, and is absent when done.

1. In Manslaughter there can be no Accessary before, because done without premeditation. 4. Rep. *Bibith*'s Case.

2. Where the Execution varies from the Command in the person slain; as a command to kill *A.* and he kill *B.* or in the nature of the Offence; as Command to rob *A.* as he goes to Market, and he break open his House and robs it, the Commander is not Accessary. C. PC. f. 57.

3. But a command to poison *J. S.* and he shoots him; a command to rob or beat *J. S.* and he beats him to death, the Commander Accessary.

4. If *A.* command *B.* to kill *C.* and before the Fact *A.* repents, and coun-

countermands his command, yet *B.* kills him, *A.* is not Accessary.

5. If *A.* poison an Apple, and deliver it to *C.* to deliver to *D.* *C.* not knowing delivers it, Murder in *A.* but no Offence in *C.*

3. Accessary *after*

St. P. C. 41. 1. A receipt of stollen Goods makes not Accessary, unless he receive Thief. *Ou receive le biens a auter felon.* 9 H. 4. 1.

2. Every Receit to make an Accessary must be knowing him to be such.

But if a man be attaint of Felony in the County of *A.* the Law presumes notice thereof in the same County; therefore the Receit of him in the same County seems Accessary; *Contra* if in another County. *Videtur cognitio requisita in utroque.*

3. Receit of a Felon, that hath given bond to appear at Sessions, &c. not Accessary.

4. Relieving a Felon with money, victuals, horse for his journey, know-

knowing, Acceſſary: but if he be in Priſon then lawful. *Dal.* c. 108.

5. A Brother receiving his Brother may be Acceſſary, or a Huſband his Wife, but not the Wife of her Huſband.

6. A man may be Acceſſary to an Acceſſary: And

The ſame man may be Principal and Acceſſary where Felony done by divers.

7. But ſending a Letter in favour of a Felon, inſtructing him to read, adviſing to labour witneſſes not toappear, not revealing a Felony intended, permitting a Felon to eſcape without Arreſt, makes no Acceſſary: *Mes contempt.*

8. Acceſſary cannot be unleſs a Felony committed; therefore *A.* wounds *B.* dangerouſly, *C.* receives *A.* then *B.* dies, *C.* is not Acceſſary.

9. *Si Felon vient al meason* I. 8. *que suffer lui d' aler hors nest Felony nisi prist mony ou autrechose pur lui suffer escape.* 9 H. 4. 1.

Arrainment

Arraignment of the Principal and Accessary, and things Observable therein.

1. IF the Principal be acquitted, or be convict only of Manslaughter, or *se Defendendo*, or before Attainder hath his Clergy, or be pardoned, or die, the Accessary shall not be Arraigned, otherwise if after Attainder. S. P. C. 47. C. PC. 139. 4 R. Sym's Case.

2. If the Principal be attaint at the Suit of the King, the Accessary shall not be Arraigned at the Suit of the party. *Iffint si soit attaint d' auter felony.* S. PC. 47.

3. If Principal stand mute, Accessary not Arraigned. *V. Contra* 2 *R.* 3. 22. 3 *H.* 7. 11.

4. The *Exigent* shall not go out against Accessary till Principal attaint by *Stat. W.* 1. c. 14. St. PC. 46.

5. Where

5. Where Principal appears not, Acceſſary ſhall be put to anſwer: but he ſhall not be tried till Principal attaint or appear, unleſs he will, for he may wave the benefit of the Law.

6. If he be Indicted as Acceſſary to two, and one of the Principals appears and is convict, the Court may, if they pleaſe, try the Acceſſary; and if he be found Acceſſary to him that is attaint, he ſhall be condemned; if not found Acceſſary to him, yet he may after be Arraigned as Acceſſary to the other when he appears.

St. P. C. 47.

Com. 100. *Gittin's* Caſe.

7. If Principal and Acceſſary appear and plead to the Felony, they may be tried by the ſame Inqueſt; but the Principal muſt be firſt Convict, and have Judgment, before Judgment againſt Acceſſary, and the Jury ſhall be [Charged] that if they find Principal not guilty, they ſhall find the Acceſſary not guilty.

2 Weſt. 1. c. 14.

8. If Principal be Erroneouſly attainted, yet Acceſſary ſhall not take

take advantage thereof, but be Arraigned.

9. If Murder or other Offence were in one County, and Acceſſary in another by *Stat.* 2 *E.* 6. *c.* 24.

1. If Acceſſary be in *Middleſex*, where the King's Bench ſits, and Principal in another County, the King's Bench may try the Acceſſary. C. P. C. p. 49.

2. Certificate in ſuch caſe ſhall be upon a *Certiorari* or Special Writ, if need be, formed upon the Matter, and not by Precept, under their Seals, in their own Names. Ibid.

3. The High Steward is within the Act.

Acceſſory al Petit Larciny. 3 Cr. 750. *nemy al Homicide per infortun.* 15 E. 3. Coron. 116.

Novel felony fait per Stat. videtur null Acceſſory niſi ſpecialment enact. quæ. V. Dy. 88. Stam. 44.

Vi pur Tryal d' Acceſſory in forein County, 2 E. 6. cap. 24. Dy. 253.

Acquit

Acquit com Principal, remey arrain come Accessory: mes acquit come Accessory arrain come Principal.

Mute, Paine fort & dure.

V. Stat. Weſt. 1. cap. 12. & ẽẽ Inquiry de ofſence dnt' Pain fort & dure.

NOW we come *to the Demeanor of the Priſoner* upon his appearance:
And thereupon either,
1. He ſtands mute.
2. He pleads.
3. Or he confeſſeth the Fact.

1. What ſaid a *ſtanding mute?*
This of two kinds.

1. When he anſwers nothing at all: and then it ſhall be enquired whether he ſtand mute by malice or by the act of God. C. Weſt. 1. c. 12. S. PC. f. 150.

If it be by the act of God, then the Felony ſhall be enquired of, and whether he be the ſame perſon, as if he had pleaded not guilty.

If by malice, or if the Priſoner hath cut out his own tongue, then he ſhall have Penance.

Nota, *Si ad unfoits pled al Felony*

licet apres eſtoit mute, ſer. trie. 15 E. 4. 33.

Viez Pere eſtoit mute aver. Penance. 7 *Car.* Lord *Caſtlehaven's* Caſe.

2. When he pleads, but not effectually; as when he anſwers not directly to the Fact, or concludes not upon the Country, then if the cauſe be probable, he ſhall be put to his Penance. *C. P. C. p.* 227.

Nota, *Si Chall. ultra* 35. Standing mute. V. *C. PC. fo.* 227.

2. What *the conſequent* of ſtanding mute? 1. *forfeit biens.* 14 E. 4. 7.

1. In Treaſon it is a Conviction.

3. After Attainder and ask't what he can ſay why no Execution, ſtanding mute he ſhall be Executed.

2. In Appeal ſtanding mute, Judgment againſt him to be hanged. *Contra* 14 *E.* 4. 1.

4. Upon Stat. 33 *H.* 8. *c.* 2. of Felony within the Verge, Offender ſtanding mute Judgment againſt him.

5. But

5. But in other cases of Felony, *Paine fort & dure*, and forfeits Goods.

1. Remanded to Prison.

2. Lie naked in some dark Room with hands and legs extended.

3. Weights increased.

Pleas.

IF the Prisoner plead, it is either
1. Declinatory.
   Sanctuary.
   Clergy.
2. Or to the Felony:
   1. Demurring.
   2. Pleading in Barr.
   3. Pleading the general Issue.

Declinatory Exceptions.

1. *Sanctuary* and the Consequents *Abjuration* ousted by Stat. 21 *Jac. c.* 28.

Clergy.

2. *Clergy* wherein

1. Who ſhall have benefit of Clergy.
2. In what Caſes?
3. At what time?
4. Who the Judge?
5. What the Conſequent?

1. *Who* ſhall have Clergy, and who not?

1. A blind man ſhall not have his Clergy. *Nec* Jew, *nec* Turk: *contr. de* Greek *ou home excommeng'*.
2. A woman cannot have the benefit of Clergy.

Proviſion by Stat. 21 *Jac. c.* 6. C. P. C. c. 124. that for ſtealing Goods under 10 *s.* without Burglary or Robbery, &c. ſhall be burnt in the hand for the firſt Offence.

3. Bigamy ouſted of Clergy by *Stat. de Bigamis* 4 *E.* 1. but reſtored to it by *Stat.* 1 *E.* 6. *c.* 12.

Cestuy que abjure aver. Clergy apres son returne, 8 H. 8. Kel. 186.

Cestuy que ad unfoits Clergy naver. auterfoits nisi deins orders, 4 H. 7. c. 17.

2. *In what cases*: some things premised in general.

1. By *Stat.* 25 E. 3. *c.* 4. *pro Clero.* Clergy allowed in all Treasons or Felonies, except Treason against the King; so that after that Statute, there was Clergy in all Cases but

{ Treason,
{ Sacriledge.

2. Consequently wheresoever Clergy is not allowable in any other cases, it is taken away by some Act of Parliament.

3. Consequently where any Felony is made by a new Stat. Clergy is to be allowed, unless expresly taken away.

4. Con-

4. Consequently where by any special Act of Parl. Clergy is taken away in any Offence, the Indictment ought to bring the Case within the Statute. As upon the Stat. 3 & 4 *Ph. & Ma.* c. 4. the Indictment must run *Malitiose*; so upon Stat. 8 *El.* c. 4. it must be *clam & secrete*; in case of Murder, *ex malitia præcogitata*, otherwise Clergy allowable.

5. Consequently a Statute taking away Clergy from the Principal, doth not thereby take it from the Accessaries before, unless specially provided for.

6. Where Clergy is allowable, it is to be allowed though the party be Convict by Confession, Verdict, or stands Mute, or challenges peremptorily above 35.

2. *Particular Offences* where Clergy, and where not.

1. High *Treason* no Clergy.

2. In Petty Treason.

Principal ouſt of Clergy if convict by Verdict or Confeſſion by *Stat.* 23 *H.* 8. *c.* 1. revived by 5 & 6 *E.* 6. *c.* 10. and by *Stat.* 25 *H.* 8. *c.* 3. though ſtanding Mute, not directly anſwering, or challenging above twenty.

Not ouſt of Clergy in Appeal, unleſs Convict by Verdict or Confeſſion.

Acceſſaries before the Fact maliciouſly, ouſt of Clergy in all caſes by 4 & 5 *Ph.* & *Ma. c.* 4.

3. Wilful *Murder* of Malice prepenſe, Principal ouſt of Clergy in all caſes by *Stat.* 23 *H.* 8. *c.* 1. 25 *H.* 8. *c.* 3. 1 *E.* 6. *c.* 12.

Acceſſary before maliciouſly, ouſted in all caſes by 4 & 5 *Ph.* & *Ma. c.* 4.

4. *Ar-*

4. *Arſon* of Houſes, or Barns full of Corn, Principal ouſt of Clergy in all caſes, *viz.* *ſur* Conviction by Verdict, or Confeſſion, by 23 *H.* 8. *c.* 1. upon ſtanding Mute, not direct anſwering, challenge above twenty, by *Stat.* 25 *H.* 8. *c.* 3.

But Utlary ſtands ſubject to Clergy.

Acceſſary ouſted of Clergy in all caſes by 4 & 5 *Phil.* & *Ma. c.* 4.

5. Simple *Burglary.*

Principal ouſted of Clergy if utlawed, Convict by Verdict, or Confeſſion.

Not ouſted if ſtand Mute, challenge above twenty, or not directly anſwering.

Acceſſary before or after not ouſt of Clergy.

6. Burglary, any perſon being in the Houſe, or put in fear or dread;

Prin-

Principal ouſt of Clergy in all caſes, *viz.* by *Stat.* 1 *E.* 6. 12. in caſe of any Conviction or Attainder; and by 25 *H.* 8. *c.* 3. revived by 5 & 6 *E.* 6. *c.* 10. it takes away Clergy where above twenty challenged.

But Acceſſaries not ouſted of Clergy.

7. *Robbery*, which hath ſeveral Qualifications, with theſe Conſiderations:

1. From the Perſon

Without putting in fear, but *clam & ſecrete*: by Stat. 8 *El. c.* 4. Principal in all caſes ouſt of Clergy, Acceſſary not ouſt.

With putting in fear, Robbery in or near the High-way.

1. Principal in all caſes ouſt of Clergy, *viz.* if Appeal or Indictment by 23 *H.* 8. *c.* 1. Convict 23 *H.* 8. *c.* 1. Attaint 1 *E.* 6. *c.* 12. Mute, Challenge above twenty by Stat. 25 *H.* 8. *c.* 3. revived by 5 & 6 *E.* 6. *c.* 10.

2. Ac-

2. Accessary before ouſt of Clergy in all caſes by 4 & 5 *Ph. & Ma. c.* 4.

2. From Dwelling-houſe; and this of three kinds:

1. Owner, wife, or ſervants being in the houſe, or put in fear, here Clergy.

1. As to Principal, taken away by 23 *H.* 8. *c.* 1. in caſe of Conviction by Verdict, or Confeſſion, and by 25 *H.* 8. *c.* 3. revived by 5 & 6 *E.* 6. *c.* 10. in caſe of ſtanding mute, challenge *ultra* twenty, not directly anſwering: Alſo to a Conviction in a foreign County, if it appear by Examination not to be within Clergy in the ſame County.

2. Accessary in all caſes ouſt of Clergy by *Stat.* 4 & 5 *Ph & Ma. c.* 4.

Nota, A Stranger in the houſe brings it not within Statute.

2. Rob-

2. Robbing any person by day or night, any person being in the same house, and put in fear.

Principal ouſt of Clergy by 1 *E.* 6. *c.* 12. in all cases, but challenging twenty; and by *Stat.* 5 & 6 *E.* 6. if in a foreign County Clergy upon Examination taken away.

Acceſſaries, Clergy taken away by 4 & 5 *Ph.* & *Ma. c.* 4. in all cases.

3. Robbing any person in his Dwelling-house, the Owner, his wife, or children being in any part of the house, or within the precincts thereof, though there be no putting in fear. And this extends to Booths in Fairs.

Principal ouſt of Clergy by 5 & 6 *E.* 6. *c.* 9. in case where the Offender is found guilty.

Prin-

Principal thereof in other caſes, ſhall have Clergy; as in ſtanding mute, challenge *ultra* twenty.

Acceſſary ouſt by *Stat.* 4 & 5 *Ph. & Ma. c.* 4.

4. Robbery to the value of 5 *s.* out of any Dwelling-houſe or Out-houſe thereunto belonging, though none in the houſe, by *Stat.* 35 *El.*

Principal ouſt of Clergy in caſe of Conviction, not of ſtanding Mute.

Acceſſary ſhall have Clergy.

Un enter in le lodging Sir H. Hungate *parcell de* Whitehall, *nul perſon eſteant in lodging, mes in autre part de* Whitehall *& infreint un chamber & priſt biens: Rule per adviſe de Juſtices,* 1. *L' Inditment doit eſtre pur infreindre de meaſon de Roy vocat' Whitehall & pur Embleer les biens Sir* H. H. *divers perſon eſteant in le meaſon: Car nient ſemble al Chamber in Inne de Court, lon cheſcun ad ſeveral property.* 2. *Que ceo fuit deins le ſtat.* 5 & 6 E. 6. *& L' Enditement la accordant.* 3. *Que in Inditement*

ſur

sur Stat. 23 H. 8. *vel* 5 & 6 E. 6. *doit estre actual breaking & aussi Robbery.* 4. *Que si larron enter in meason le doores open, & infreint Chamber, & prist biens, est dains le Stat.* 5 E. 6. *d'ouster luy de Clergy.*

8. *Larceny* without any of these Circumstances.

Horse-stealing ousts of Clergy, by 1 E. 6. c. 12. 2 & 3 E. 6. c. 33. Principal ousted in all cases;

Accessary ousted in no cases.

But other Larceny, not being Robbery nor Cut-purse, have Clergy.

9. In *Rape*, Clergy ousted by Stat. 18 El. c. 7.

10. Though the Offence be within Clergy, yet if he had formerly his Clergy, and were burnt in the Hand, the Stat. of 4 H. 7. c. 13. ousts him of Clergy, unless he were a person in Orders, and then he must produce his Certificate presently, or by a time prefixed.

And see the Stat. 34 & 35 H. 8. c. 14. for the manner of the Certificate of such Convictions and other Attainders.

And

And though Stat. of 32 *H.*8. *c.*1. hath put men in Orders in the same condition with others, in reference to Clergy; yet as to this point of the Stat. 4 *H.* 7. the clause of the Statute 1 *E.* 6. *c.* 12. doth give a person in Orders his Clergy the second time in all cases, but in case of 1. Challenge above twenty; 2. Outlary.

3. *When* Clergy shall be *allowed.*

1. Now the use is not to put the party to challenge his Clergy till he hath pleaded, and the Inquest thereupon taken:
   1. For advantage of the party, if acquitted. St.P.C. fo. 131.
   2. For advantage of the King for forfeiture, if Convict.
2. It may be allowed in Discretion, though the party challenge not.

Allowed under the Gallows, or where Judgment of *pain fort & dure* given, or where challenge above twenty.

V.

V. *Crom. Jur.* 126. *Allow ſouth Gallows per Juſt. B. R. mes nemy Goal Delivery: mes pur apres Judgment devant adjournment, Dy.* 205.

Licet Ordinary return non legit, *& eſt record, & repry al autre Seſſions, & tunc legit, avera benefit de ceo,* Dy. 202. 34 H. 6. 49. Coron. 20.

4. The *Judge.*

The Ordinary is but Miniſter, the Judge at Common Law is the Judge when and where to allow it, and of the Reading, 9 E. 4. 28. *Coron.* 32.

5. What the *Effect* of Clergy allowed:

1. In ancient time the Conſequent was delivery to the Ordinary, either to make Purgation, or *abſque Purgatione*, as the caſe required.

But by Stat. 18 *El. c.* 7. now only burnt in the Hand, which hath theſe effects;

1. Enables the Judge to deliver him out of Priſon; but yet if he ſee cauſe, he may detain him till he find Sureties of good behaviour:

And

And by the *Stat.* 3 *H.* 7. *c.* 1.

If Clergy within the year, he is to be bailed or committed at diſcretion, till the year paſt.

2. It gives him a Capacity to purchaſe Goods, and retain the profits of his Lands. *Foxlye's* Caſe, 5. Rep.

But the Goods he had at the time of the Conviction are forfeit.

3. It reſtores him to his Credit. *Hob.* 377. *Searle's* Caſe.

Le Stat. 25 H. 8. *que toll Clergy del perſons arrain in forrein County ſur examination extent ſolment al tiels felonies d'ont Clergy ouſt per Stat.* 23 H. 8. *& nemy per ſubſequent Stat. Et pur ceo rule in* Anne Cole's Caſe, *Si feme infreint meaſon in County de* S. *in day time, & priſt biens South value de* 10 s. *& eux import in County de* D. *& la arraine, el ſerra arſe in maine: quia nul miſter in pavor come require per le Stat.* 23 H. 8.

Robbery de value de 10 d. *& import in forrein County & la arrain eſt Petit*

tit Larceny. 2 Jac. Moores Rep. *quia Le Stat.* 25 H. 8. *extend ſolment al ceſtuy que demand Clergy, que neſt in caſe de Pet. Larceny.*

Indite de Robbery in quadam via pedeſtri *avera Clergy : Car le Stat. parle de Robbery* in vel prope altam viam regiam. *T.* 38 *Hen.* 8. *Moore* 5.

Pleas

Pleas to the Felony.

1. DEmurrer.
2. Pleas in Abatement and Barr.
3. The General Iſſue.

1. For *Demurrer.*

It amounts to a Confeſſion of the Indictment, as laid; and therefore if the Indictment good, Judgment againſt the Priſoner, and Execution. C. Weſt. 1. c. 12.

2. For Pleas *in Abatement.*

If Priſoner plead *Miſnoſmer* of his Surname unto an Appeal, it goes in Abatement; But in caſe of Indictment he ſhall be put to anſwer the Treaſon or Felony. St. P.C. 181. 1 H. 5. 5.

But Miſnoſmer of the Chriſtian Name goes in Abatement; and if it be confeſſed by the King's Attorney, or found, the Indictment falls. 11 *H.* 4. *Coron.* 88.

But then he muſt give his true Name, and by that Name he may beforthwith Indicted.

Pleas in Barr.

Auterfoits acquit.

Auterfoits acquit:

1. If a perſon be acquitted upon an inſufficient Indictment or Appeal, yet upon a new Indictment he may be arraigned for the ſame Felony. 4 *R. Vaux*'s Caſe, *licet Judgment done.*

St. PC. f. 105, 106.

2. *Auterfoits acquit* of one Felony, no Barr to an Indictment or Appeal of another Felony, &c. though committed before the Acquittal.

3. *Auterfoits acquit* as Principal, no Barr to an Indictment againſt him as Acceſſary to the ſame Felony after; But it ſeems he cannot be after Indicted as Acceſſary before *Stamf.* 105.

4. In an Appeal of Death or other Felony, *Auterfoits acquit*, upon an Indictment for the ſame Felony, was a good Barr in all Caſes; therefore

if

if an Appeal was pending, the Court would ſurceaſe the Arraignment of the Priſoner upon an Indictment till it was determined: Or though no Appeal pending, yet in caſe of death, would ſurceaſe till the year paſt.

But at this day *Auterfoits acquit* in an Indictment of Death no Barr to an Appeal, by *Stat.* 3 *H.* 7. *c.* 1. for the Priſoner notwithſtanding the Acquittal; but in other Appeals it ſtands a Barr to an Appeal.

5. But *Auterfoits acquit* in an Appeal, Barr to an Indictment of the ſame Felony.

1. Unleſs the Appeal be Erroneous in Subſtance.

2. Or unleſs the Appeal be by a wrong Perſon.

3. Unleſs the Acquittal be by Battel; for in theſe caſes he may be Indicted again.

6. He that pleads this Plea, need not have the Record *in poigne*, becauſe it goes in Barr. 3 *E.* 3. *B. Coron.* 217.

7. Though there be *Variance* between the Indictment, &c. yet if it be ſuch as may admit an *Averment*, to be the ſame, yet it may be pleaded.

Variance in the *Name* if *Comu per un name & auter.*

Variance in the *day* of Felony ſuppoſed to be committed.

Variance in the *place*, but by the Opinion of 4 *H.* 5. acquit of Larceny in one County no Barr in another.

Variance in L'offence auterfaits acquit, attaint de murder ou manſlaughter turr. Pet. Treaſon.

Auterfoits Convict or *Attaint.*

1. Where a Barr to the ſame Felony.

1. *Auterfoits attaint* of the ſame Felony in an Appeal Barr to an Indictment; for the Effect is obtained, the death of the party; But *vid.* no Barr in Appeal. *C. PC.* 213.

2. *Auterfoits convict* by Verdict or Confeſſion of Manſlaughter in an Indictment, and had Clergy, Barr in Appeal, though it be of Murder, for the fact the ſame in both, though the offences differ in degree. 4. Rep. 45. *Wigg's* Caſe.

Auterfoits acquit ſur inſuffieient enditement, & nul Judgment done, neſt plea: mes auterment eſt ſi Judgment ſoit done tanque ceo reverſ. *Vauxe's* Caſe, 4. *Rep.*

2. Where a Barr to an Arraignment for anothr Offence.

S. P. C. 107. 1. *Auterfoits attaint* of Felony is no Barr to Arraign him of Treaſon committed before the Felony for the King's Intereſt.

C. P. C. 213. And it ſeems if the Treaſon was committed after the Felony, then he ſhall be Arraigned of the Treaſon, for the Offence is different.

2. *Auterfoits attaint* of one Felony barr to an Arraignment of Felony: but this hath theſe *Exceptions:*

1. Where the firſt Attainder is pardoned, there he may be Arraigned for the former Felonies though committed before.

S. PC. 66. 107. 2. In caſe of Appeal he ſhall be Arraigned at every one of their Suits, notwithſtanding he be Attaint at one Suit.

The like it ſeems upon Indictment of Robbery, becauſe by the Stat. the party is to have reſtitution. 3. *Au-*

3. *Auterfoits convict*, and had Clergy after Stat. 25 E. 3. *c.* 5. had been a barr to an Arraignment for another Felony, though not within Clergy. *Dy.* 214.

But now by *Stat.* 8 *El. c.* 4. after Purgation, and 18 *El. c.* 7. after burning in the Hand, he ſhall be put to anſwer former Felonies not within Clergy, or for any offence after Clergy allowed.

And note, that he that pleads a Plea in barr to an Indictment or Appeal that confeſſeth not the Felony, ſhall plead over to the Felony; otherwiſe if it confeſs the Felony; as Pardon, or Releaſe.

Pardons.

Pardons.

3. PArdons Are either *of Course and Right*; ſuch are:

1. For a perſon Convict of Manſlaughter, or *ſe defendendo*.

S. PC. 102. 2. An Approver that vanquiſheth the Appellee.

Pardons *of Grace*.

1. Some things requiſite to their allowance *by Statute*.

1. By *Stat.* 13 *R.* 2. *c.* 1. Pardon of Murder, Rape, or Treaſon muſt be eſpecially expreſſed in the Pardon, otherwiſe it ought not to be allowed in ſuch caſes. *Vide ſi extend al Petit Treaſon & Acceſſaries*, 22 E. 4. 19. Lamb. 293.

2. By Stat. 10 *E.* 3. *c.* 2. there muſt be Surety of good abearing, otherwiſe the Charter void; but a ſpecial *Non obſtante* may prevent it.

2. Matter

2. Matter *at Common Law* conſiderable.

1. Charter of Pardon no barr of an Appeal: and if the party be utlawed in Appeal, and the King pardon, he ſhall have a *Scire Facias* againſt the Appellor, who may pray Execution notwithſtanding ſuch Pardon; but if returned *Scire feci*, and appears not, then Appellee ſhall upon the Pardon be diſcharged.

2. Pardon of all Felonies is no barr to Execution, if the Felon be Attaint; yet an Exception of all Burglaries excepts the Burglary for which the party is Attainted.

3. Pardon of all Attainders not good with a Pardon of the Felony.

4. The Pardon of Felony reciting in the Pardon that the party is Indited, and in truth he is not, this is void.

5. The

C. PC. 337.

5. The King may pardon the burning in the hand in Appeal, & *l' imprisonment per ceo discharge.*

6. *Sil apres infreint Peace Scire fac. gist a repealer le Pardon, & ser. pendu pur primer offence per le Stat.* 10 E. 3. 3 H. 7. 7. *vizt. nisi soit non obstante le Stat.*

7. *Pardon de tout Felonies per A. & B. vel eor. alter. commit, pardon several* Dy. 34. 23 E. 4. 7.

Pleading the Pardon.

He that pleads a General Pardon by Parliament, wherein are Exceptions, must averr that he is none of the persons excepted.

But of a General Pardon by Parliament without Exception the Court *ex Officio* must take notice.

He that pleads a Particular Pardon,

1. Must shew it under Seal.

2. Must have a Writ of Allowance, *q'il ad trove Surety scm. Stat.* 10 E. 3.

Mes

Mes lou nul briefe d' allowance nul mort, 5 E. 4. 13b.

3. If variance he muſt averr that the ſame perſon.

General
By the Country.
By Peers.
By Battel.

General Issue.

THus far of Pleas in Barr upon Indictments or Appeals; now we come to *Pleas to the Fact*, *Not Guilty*.

1. Regularly he that pleads any special matter in Bar in Cases Capital, that confesseth not the Felony, notwithstanding the Plea found against him, the Felony shall be enquired of, and therefore he shall plead over to the Felony.

2. The immediate *consequent* of this Plea is *Trial*; and that is either

By the Country.
By Peers.
By Battel.

Trial

Trial per Patriam.

CONcerning Trial *per patriam*; and therein,

1. Where Iſſues tried.
2. What Proceſs againſt Jury.
3. Before whom.
4. Challenge.
5. Evidence to be given.
6. Verdict.

1. *Where* tried.

1. For Trial of *foreign Treaſons* and foreign Acceſſaries, or ſtroke in one County, and death in another, *v. ſupra* in Indictments.

2. For Trial of *foreign Pleas* by *Stat.* 22 *H.* 8. *c.* 14. made perpetual by 32 *H.* 8. *c.* 3. Foreign Pleas pleaded by a perſon Indited of Felony, and Triable by the Country, ſhall be tried where the party is Arraigned; but it is now in Treaſon triable in the foreign County by vertute of Stat. 1 & 2 *Ph. & Ma.* ſi

2. *Pro-*

2. *Process against the Jury.*

1. *Nota.* The Justices of Goal Delivery have their Pannel returned by the Sheriff, without any Precept, by a bare Award; but Justices of Oyer and Terminer not.

2. By good *Opinion*, the Justices of Peace, or Oyer and Terminer, cannot make their *Venire Facias* to try an Issue retornable the same Sessions; but Justices of Goal Delivery clearly may.

3. If several persons Arraigned upon an Indictment or Appeal, and they severally plead Not Guilty, the Plaintiff may take out one *Venire Facias*, or several. S. PC. f. 155.

4. If the *Venire Facias* be joint, Challenge by one drawn against all.

5. Though Pannel be joint, and *Tales* awarded, yet Court of Goal Delivery may after sever the Pannel to prevent that inconvenience. Com. 100.

6. In

6. In Appeal, if after Iſſue, Plaintiff tries it not, a *Venire* by *Proviſo* may be for the Defendant; yet upon that *Venire* Plaintiff may have a *Tales*.

3. *Tales*.

1. If a full Jury appear not, or be Challenged in Indictment or Appeal, the Plaintiff may have a *Tales*.

2. Upon Indictment or Appeal, becauſe Defendant may challenge peremptorily, *Tales* may be granted larger then the Principal Pannel, as forty *Tales*, 14 *H.* 7. 7.

3. But the ſucceeding *Tales* muſt be leſs than the former, unleſs the firſt be quaſhed, and then the ſame number with that which is quaſhed.

4. If any of the Jury die before ſworn, a new *Tales* grantable.

3. *Before whom.*

1. A *Nisi prius* not grantable where the King Party, unless prayed by his Attorney.

2. By *Stat.* 14 *H.* 6. c. power to Justices of *Nisi prius* to give Judgment in Felony and Treason tried before them.

3. By *Stat.* 42 *E.* 3. *c.* 11. Enquest in Assize and Goal Delivery may be taken before the Pannel returned in Court, but not in other Cases.

4. *Chal-*

Challenge.

4. *Challenge* of Array or Polls.

1. *Ex parte Regis* by *Stat.* 33 *E.* the King shall not Challenge without Cause; but yet he is not compellable to shew the cause till the Pannel perused.

2. *Ex parte prisonarii*, the Challenge is either Peremptory, or upon Cause.

1. *Peremptory* Challenge.

1. A peremptory Challenge not allowable, but where the life of a Prisoner comes in question, and therefore not upon Collateral Issues.

2. At Common Law he might have challenged peremptorily 35. under three full Juries; and if he challenged above, he should have Judgment to be hanged, 3 *H.* 7. 12.

But by *Stat.* 22 *H.* 8. *c.* 4. made perpetual, by 32 *H.* 8. *c.* 3. it is reduced to 20; and now if he Challenge above 20, he shall not be therefore hanged, or forfeit, but his

C. PC. 227. Challenge Over-ruled, and he put upon his Trial; yet *vid. Statutes, ſemble contra.*

3. In Caſe of Treaſon and petty Treaſon, the Challenge of 35 reſtored by *Stat.* 1 & 2 *P. & M. c.* 10.

2. Challenge *for Cauſe*; we mention but three;

1. Cauſe of *Inſufficiencies.* By the Stat. 2 *H.* 5. *c.* 3. 40 *l. per Ann.* required in County; but this, as to Aliens, corrected by 8 *H.* 6. *c. ult.* in Cities by Stat. 23 *H.* 8. *c.* 13. Goods to the value of 40 *l.*

2. *Unindifferency.*

Indictor not to be of Jury by *Stat.* 25 *E.* 3. *c.* 3.

3. In reference to an *Alien, & medietat' linguæ*, where

1. In no Caſe Indictors ought to be *de medietate linguæ.*

2. In Treaſon trial *per medietat' linguæ repel per Stat.* 1 & 2 *Ph. & Ma. que ad repel* 28 *E.* 3. in that Caſe.

3. In

3. In Appeal by an Alien against an Alien no *medietat linguæ.*

4. Scot no Alien, to have *medietatem linguæ.*

5. The Jurors need not be of the same Nation, but any Aliens.

6. He that will have advantage of Trial *per medietatem linguæ* must pray it, otherwise he cannot have benefit by way of Challenge. *Dy.* 304. 357.

7. *Egyptians* excluded from the Trial *per* 1 & 2 *Ph. & Ma. c.* 4.

Evidence.

5. *Evidence to the Petit Jury.*

1. In Case of *Treason*

There must be two Accusers or Witnesses by *Stat.* 1 *E.* 6. *c.* 12. & 5 *E.* 6. *c.* 11. and this stands notwithstanding Stat. 1 & 2 *Ph.* & *Ma. c.* 11. but only in Case of Treason for Counterfeiting Coin.

These Witnesses must not be only by hearsay.

2. In Case of *Felony.*

1. What allowed as Evidence:

1. By *Stat.* 1 & 2 *Ph.* & *Ma. c.* 13. & 2 & 3 *Ph.* & *Ma. c.* 10. the Justice hath power to Examine the Offender and Informer.

2. The Examination of the Offender not upon Oath, but Subscribed by him.

3. Examination of others must be upon Oath.

4. This must be certified by the Justices.

1. If it be but a small Felony, to the Sessions.

2. If

2. If it be a great Felony, &c. to the next Goal Delivery.

5. These Examinations, if the party be dead or absent, may be given in Evidence.

But Prudence to have the Justice or his Clerk sworn to the truth of the Examinations.

6. But Examinations taken upon a Cause of Divorce for a forcible Marriage, not allowed to be read upon an Indictment upon 3 *H.* 7. for the same Marriage.

By whom.

1. *Wife*, or her Examination, not to be used for or against her Husband. Dal. c. 111.

2. The Examination of an *Infant* of Thirteen, nay of Nine, allowed in some Cases.

3. One Attaint of Conspiracy, Forgery, or Perjury, not allowed a Witness.

4. One duly set on Pillory. C. P. C. 219.

3. In what manner. S 4 1. Evi-

1. Evidence for the King always upon Oath;

C. PC. c. 22. But Evidence for the Prisoner not upon Oath; yet no known Law that restrains it: But by some Statutes in some Cases, Evidence for the Prisoner upon Oath, as 1 *El.* c. 4. 4 *Jac.* c. 1.

The Confession of the Offender taken upon Examination, Evidence with Oath not of the Informer.

4. Where Evidence maintains the Indictment.

1. If the Indictment be of a Felony, &c. at one *day*, though the Evidence be of another day, the Jury may find generally against Prisoner, and leave the person that is interessed in point of time to falsifie; Or the Jury may find the true day upon their Verdict, and then the forfeiture shall relate thither.

C. PC. f. 230.

2. If the Indictment lay the Felony at one *place*, the Evidence proving the Fact at another place in the same County, maintains the Indictment.

3. If

3. If the Indictment and Evidence differ in *specie mortis*, then it maintains it not; as Indictment of Poisoning, Evidence of stabbing maintains it not.

But if the Indictment be of poysoning with one kind of Poison, and the Evidence of another; or of killing with a Dagger, and the Evidence of killing with a Staff, yet it maintains the Indictment; for it agrees in substance and kind. C. P. C. 135. 9. Rep. *Mackally's* Case.

The like of Accessaries before, though the Poison or Weapon different.

4. Indictment that *A.* gave the mortal blow, and *B. C.* and *D.* were *presentes & abettantes*; Evidence that *B.* gave the blow, and *A. C.* and *D. presentes & abettantes*, yet it maintains the Indictment.

5. Indictment of *A.* as Accessary to *B.* and *C.* Evidence proves him Accessary only to *B.* maintains the Indictment. 9. Rep. *Sawchar's* Case.

6. Indictment of Murder, *ex malitia præcogitata*; Evidence of malice

lice in Law, as killing an Officer, or without Provocation, yet maintains the Indictment.

7. Indictment upon Statute of Stabbing, 21 *Jac.* Evidence that the dead stroke first, yet Evidence to maintain the Indictment for Manslaughter generally. *H.* 23 *Car. Hormood's* Case.

8. Two Indicted as Principals, Evidence proves one Accessary before, he shall be discharged of that Indictment. 26 *H.* 8. 5.

9. *Vid. Stat.* 21 *Jac. c.* 27. Mother endeavoring to conceal the death of her Bastard-child, shall suffer death as in case of Murder, unless she prove by one Witness that the Child was born dead.

Vid. Act. 17 *Car. in fine,* for the further Relief of his Majesties Army in the Northern parts, Act continued till end of next Sessions; continued over till some Act of Parliament for their continuance or discontinuance.

Verdit.

Verdict.

VERDICT in Cases Capital.

1. It must be given, and the Jury cannot be discharged till it be given. St. P. C. 165.

2. It must be given openly in Court, and no privy Verdict.

3. It may be found Specially; as an Indictment of Murder, the Jury may find him Guilty

1. Of Manslaughter:
2. *Per Infortunium:*
3. *se Defendendo.*

But then they must find the manner of it, that the Court may Judge thereof; so for the value or the manner of the Larceny.

Trial by Battel, Peers.

NOw we should come to Trial By Battel

By Peers; & the whole Process thereof, *C. Pl. Cor.* 27.

Judg-

Judgments in the several Cases.

I. *In High Treason.*

C. P. C. 218, 219.

1. In all Cases, except Counterfeiting Coin, Drawn, Hang'd, Entrals taken out and burnt, Head cut off, Body quartered, Head and Quarters hang'd up.

2. In Counterfeiting Coin, Drawn and Hang'd: *Ussint per tonsure.* Dy. 230.

But the Judgment of a Woman in those cases, Drawn and Burnt.

II. *In Petty Treason.*

1. For a Man, Drawn and Hang'd.

2. For a Woman, Drawn and Burnt.

III. *In Felony.*

Hang'd till Dead: And this cannot be by the King altered to Beheading.

IV. *In*

IV. *In Petty Larceny.*

To be Whipt.
He forfeits Goods.

V. *Death per Infortunium.*

No expreſs Judgment; yet Forfeits Goods.

VI. *Death ſe defendendo.*

No expreſs Judgment; yet Forfeits Goods.

VII. *Miſpriſion of Treaſon.*

Forfeits Goods; Forfeits Profits of Land during Life; perpetual Impriſonment.

Vide for Seiſure of Goods.

1. Not before Indictment.
2. Not removed before Attainder. 1 *R.* 3. *c.* 3.

Fal-

Falsifying Attainder.

1. By the Party, by *Writ of Error.*
2. By others *Falsifying* it.
   1. A Purchaser may falsifie an Attainder of the Vendor by Utlary or Confession in the point, if he Purchase before the Attainder, and after the time of the Felony supposed.
   2. A Purchaser *mesne* between the time of the Felony committed, and the Attainder by Verdict, cannot falsifie in the point of the Offence, but he may for the time.
   3. If the Attainder was by such as had no good Commission, the Party himself may falsifie the Attainder. *Cases Com. Leicest.*
   4. If the Principal Attainted, and then the Accessary and Principal reverse the Attainder, the Attainder of the Accessary is *eo ipso* avoided, and his Heirs may have *Mortdanc'* against the Lord by *Escheat.*

5. At-

5. Attaint of Treason, and then the Treason is pardoned by Act of Parliament, the Party or his Heir shall falsifie Attainder.

6. In Case of *Goods*.

Fugam fecit found by the Coroner, cannot be falsified, though upon his Arraignment it be found he did not fly: But if the Indictment be void or insufficient, no Forfeiture.

A man Indicted before Justices of Oyer and Terminer, acquit by Verdict, and found he fled, and the particulars of his Goods found, they may be Traversed. S. P. C. 148.

Default till *Exigent*, though after acquitted, Goods Forfeited; for it is a *fugam fecit* in Law.

But if the Indictment, Appeal, or Process insufficient, the Forfeiture saved; so if it be reversed by Error, or pardoned before *Exigent*.

Note, Flight or *Exigent* in case of Petty Larceny, Forfeits Goods.

Execution

Execution and Reprieve.

C. P. C. 212. 217.

1. THe Execution muſt be purſuant to the Judgment, and cannot be altered by the King, as from Beheading to Hanging.

2. But King may pardon part of the Execution; as in Treaſon, he may pardon all but Beheading.

3. It muſt be done by the proper Officer.

C. P. C. 7. 217. S. P. C. 198.

4. If a Woman, Convict of Treaſon or Felony, be quick with Child, ſhe ſhall have one Reprieve, but not a ſecond time.

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